

No. 15293

United States
Court of Appeals
for the Ninth Circuit

CEDAR CREEK OIL AND GAS COMPANY,
a corporation, INTERNATIONAL TRUST
COMPANY, a corporation, H. C. SMITH,
SUSAN M. WIGHT and W. B. HANEY,
Appellants,

vs.

FIDELITY GAS COMPANY, a corporation,
MONTANA-DAKOTA UTILITIES COM-
PANY, a corporation, and SHELL OIL
COMPANY, a corporation, Appellees.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 344, inclusive)

Appeal from the United States District Court
for the District of Montana
Billings Division

FILED

JAN 23 1957

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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District of the State of Montana, in and for the County of Fallon, to the District Court of the United States, in and for the District of Montana, Billings Division. Petition for removal and bond on removal were filed in the District Court of the United States on February 25, 1953, true and correct copies of which are attached hereto.

Dated this 25th day of February, 1953.

COLEMAN, JAMESON & LAMEY

/s/ By COLE CROWLEY

A member of the firm,

Attorneys for Defendants

Of Counsel: Armin Johnson, Faegre & Benson,
Raymond Hildebrand.

[Endorsed]: Filed February 25, 1953.

[Title of District Court and Cause.]

PETITION FOR REMOVAL

Come now the defendants and for their petition for removal allege:

I.

That on or about February 2, 1953, plaintiffs commenced an action against these petitioning defendants by filing a complaint in the District Court of the Sixteenth Judicial District of the State of Montana in and for the County of Fallon; that plaintiff thereafter caused a copy of the alias summons and copy of the amended complaint to be served upon

each of the defendants; that a true and correct copy of the alias summons and amended complaint served upon petitioning defendants is attached hereto marked Exhibit 1 and is by this reference made a part hereof.

II.

That said cause of action is of a civil nature at law and the matter and amount in dispute exceeds the sum or value of \$3000.00, exclusive of interest and costs.

III.

That it appears from the face of the amended complaint attached hereto as Exhibit 1 that plaintiffs have joined in one complaint separate and independent claims or causes of action between plaintiffs who are citizens and residents of one state and defendants who are citizens and residents of other states; that the plaintiff, Mondakota Gas Company is a corporation duly organized, created and existing under and by virtue of the laws of the State of Nevada; that the defendants, Fidelity Gas Company, Montana Dakota Utilities Company, and Shell Oil Company, are corporations duly organized, created and existing under and by virtue of the laws of the State of Delaware; that the third and fourth causes of action of said amended complaint are separate and independent claims or causes of action solely between said plaintiff Mondakota Gas Company and said defendants; that the matter and amount in dispute involved in said third and fourth causes of action exceeds the sum or value of \$3000.00, exclusive of interest and costs. That the

plaintiff International Trust Company is a corporation duly organized, created and existing under and by virtue of the laws of the State of Colorado; that the fifth and sixth causes of action of said amended complaint are separate and independent claims or causes of action solely between said plaintiff International Trust Company and these petitioning defendants and the matter and amount in dispute involved in said fifth and six causes of action exceeds the sum or value of \$3000.00, exclusive of interest and costs. That the plaintiff Susan M. Wight is a citizen and resident of the State of Montana; that the seventh and eighth causes of action of said amended complaint are separate and independent claims or causes of action solely between said plaintiff Susan M. Wight and these petitioning defendants and the matter and amount in dispute in said seventh and eighth causes of action exceeds the sum or value of \$3000.00, exclusive of interest and costs. That the plaintiff H. C. Smith is a citizen and resident of the State of California; that the ninth and tenth causes of action of said amended complaint are separate and independent claims or causes of action solely between said plaintiff H. C. Smith and these petitioning defendants and the matter and amount in dispute involved in said ninth and tenth causes of action exceeds the sum or value of \$3000.00, exclusive of interest and costs. That the plaintiff, W. B. Haney is a citizen and resident of the State of California; that the eleventh and twelfth causes of action of said amended complaint are separate and independent claims or causes of

action solely between said plaintiff W. B. Haney and these petitioning defendants and the matter and amount in dispute involved in said eleventh and twelfth causes of action exceeds the sum or value of \$3000.00, exclusive of interest and costs.

IV.

That the second, fourth, sixth, eighth, tenth, and twelfth causes of action of said amended complaint involve claims or causes of action arising under the laws of the United States of America in that they constitute attempts on the part of the plaintiffs to abrogate and set aside unit agreements for the development of federal oil and gas leases and other contractual relationships with respect to said federal oil and gas leases, which said unit agreements have been and now are promulgated under and pursuant to the rules and regulations of the Secretary of the Interior of the United States of America and were before promulgation submitted to and approved by said Secretary of the Interior.

V.

That each and all of said twelve causes of action in the amended complaint involve claims or rights arising under the laws of the United States of America, and in particular under Title 30, U.S.C., Sections 181-194 and 221-236, in that they involve rights and interests in lands and minerals owned and leased by the United States of America, rights and interests in said lands and minerals as controlled and regulated by the Secretary of the Interior of

the United States of America under and pursuant to said federal statutes, and rights and interests in unit agreements and other contracts with respect to said lands and minerals prescribed by and approved by the said Secretary of Interior of the United States of America under the authority of said federal statutes and in particular under the authority of Title 30, U.S.C. Section 226e.

VI.

That this petition is made and filed herein within twenty days after service of summons upon the petitioning defendants; that your petitioning defendants desire to remove this amended complaint before the trial thereof from the said district court of the Sixteenth Judicial District of the State of Montana in and for the County of Fallon to the United States District Court in and for the District of Montana; that your petitioning defendants dispute the claims and demands of plaintiffs and deny the same and deny that the plaintiffs, or either of them, are entitled to any judgment or relief against the petitioning defendants prayed for in said amended complaint.

VII.

That petitioning defendants file and present herewith a good and sufficient bond with good and sufficient surety as provided and required by the statutes of the United States in such cases, conditioned that they will pay all costs that may be awarded by the District Court of the United States for the District of Montana to the plaintiff, or either of them,

if said District Court shall hold that the above entitled cause was wrongfully or improperly removed hereto.

Wherefore, petitioners pray that this honorable court accept this petition for removal and jurisdiction of this cause.

COLEMAN, JAMESON & LAMEY

/s/ By COLE CROWLEY

A member of the firm,

Attorneys for the defendants.

Of counsel for defendants Fidelity Gas Company and Montana Dakota Utilities Company: Armin Johnson, Faegre & Benson, Raymond Hildebrand.

Duly Verified.

In the District Court of the Sixteenth Judicial
District of the State of Montana, in and for
the County of Fallon

CEDAR CREEK OIL AND GAS COMPANY, a
corporation; INTERNATIONAL TRUST
COMPANY, a corporation; MONDAKOTA
GAS COMPANY, a corporation; H. C.
SMITH; SUSAN M. WIGHT; and W. B.
HANEY, Plaintiffs,

VS.

FIDELITY GAS COMPANY, a corporation;
MONTANA DAKOTA UTILITIES COM-
PANY, a corporation; and SHELL OIL COM-
PANY, a corporation, Defendants.

ALIAS SUMMONS

The State of Montana to the Above Named Defendants, Greetings:

You are hereby summoned to answer the complaint in this action, which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney, within twenty (20) days after the service of this Summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the Complaint.

This is an action to quiet title of the plaintiffs in and to those certain lands and leases, situated in

Fallon County, State of Montana, and described as follows, to-wit:

Lease Number 025044-A covering the Southeast Quarter ($SE\frac{1}{4}$), South Half of the Northeast Quarter of the Southwest Quarter ($S\frac{1}{2} NE\frac{1}{4} SW\frac{1}{4}$), South Half of the Southwest Quarter ($S\frac{1}{2} SW\frac{1}{4}$) of Section Twenty-three (23); Northeast Quarter ($NE\frac{1}{4}$) of Section Thirty-five (35), all in Township Eight (8), North Range Fifty-nine (59), East Montana Meridian. Containing 420 Acres.

Lease Number 025044-B covering the North Half ($N\frac{1}{2}$), Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4} SW\frac{1}{4}$), North Half of the Northeast Quarter of the Southwest Quarter ($N\frac{1}{2} NE\frac{1}{4} SW\frac{1}{4}$) of Section Twenty-three (23); North Half ($N\frac{1}{2}$), Southeast Quarter ($SE\frac{1}{4}$) of Section Twenty-four (24); North Half of the Northwest Quarter ($N\frac{1}{2} NW\frac{1}{4}$), Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4} NW\frac{1}{4}$), North Half of the Southeast Quarter ($N\frac{1}{2} SE\frac{1}{4}$), Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4} SE\frac{1}{4}$), of Section Twenty-five (25); Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4} NW\frac{1}{4}$) of Section Thirty-five (35), all in Township Eight (8), North Range Fifty-nine (59), East Montana Principal Meridian. Containing 1,140 Acres.

Fee Lease, Lots Three (3) and Four (4), South Half of the Northwest Quarter ($S\frac{1}{2} NW\frac{1}{4}$), Southwest Quarter ($SW\frac{1}{4}$) of Section Two (2), in Township Eight (8), North Range Fifty-nine (59) East Montana Principal Meridian. Containing 271.45 Acres.

Fee Lease, West Half ($W\frac{1}{2}$) of Section Twelve (12), Township Eight (8), North Range Fifty-nine (59), East Montana Principal Meridian. Containing 320 Acres.

Lease Number 025001 covering the Northeast Quarter ($NE\frac{1}{4}$) of Section Twenty-five (25), Township Eight (8) North, Range Fifty-nine (59), East Montana Principal Meridian.

Lease Number 029521 covering the South Half ($S\frac{1}{2}$) of Section Five (5), and the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$ $NW\frac{1}{4}$), the Northeast Quarter ($NE\frac{1}{4}$), the Northeast Quarter of the Southeast Quarter ($NE\frac{1}{4}$ $SE\frac{1}{4}$) of Section Twenty-seven (27), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

Federal Leases 038815, 021056-A 021056-B covering the North Half of the North Half ($N\frac{1}{2}$ $N\frac{1}{2}$) of Section Ten (10), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian; the Southeast Quarter ($SE\frac{1}{4}$) and the South Half of the Northeast Quarter ($S\frac{1}{2}$ $NE\frac{1}{4}$) and the East Half of the Southeast Quarter ($E\frac{1}{2}$ $SE\frac{1}{4}$) of Section Twelve (12), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

Government Leases 026954-A, 026954-B covering Lots One, Two, Three, Four (1, 2, 3, 4), and the East Half of the Northwest Quarter ($E\frac{1}{2}$ $NW\frac{1}{4}$), and the East Half of the Southwest Quarter ($E\frac{1}{2}$ $SW\frac{1}{4}$) of Section Thirty (30), Township Eight (8),

North of Range Sixty (60), East of the Montana Principal Meridian.

The Southeast Quarter ($SE\frac{1}{4}$) of Section Eighteen (18), Township Eight (8) North of Range Sixty (60), East of the Montana Principal Meridian.

Government Lease Number 029750-A and 029750-B covering Lots One, Two, Three, Four (1, 2, 3, 4), South Half of the North Half ($S\frac{1}{2}$ $N\frac{1}{2}$), Section Four (4), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian.

213/360ths interest in Government Lease Number / 034165 covering the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}$ $SE\frac{1}{4}$) of Section Eight (8), and Lot One (1), and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}$ $NE\frac{1}{4}$) of Section Six (6), all in Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

213/360ths interest in Government Lease Number 034166 covering Lots One and Two (1, 2), South Half of the Northeast Quarter ($S\frac{1}{2}$ $NE\frac{1}{4}$), and the Southeast Quarter ($SE\frac{1}{4}$) of Section Two (2), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

Government Lease Number 038253 covering the Southeast Quarter ($SE\frac{1}{4}$) of Section Thirteen (13), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian.

Government Lease 037591 covering the West Half of the Northwest Quarter ($W\frac{1}{2}$ $NW\frac{1}{4}$), and the Southwest Quarter ($SW\frac{1}{4}$) of Section Thirteen

(13), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian.

63/360ths interest in Government Lease Number 034165 covering the Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Eight (8), and Lot One (1) and the Southeast Quarter of the Northeast Quarter (SE $\frac{1}{4}$ NE $\frac{1}{4}$) of Section Six (6), all in Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

63/360ths interest in Government Lease Number 034166 covering Lots One and Two (1, 2), and the South Half of the Northeast Quarter (S $\frac{1}{2}$ NE $\frac{1}{4}$), and the Southeast Quarter (SE $\frac{1}{4}$) of Section Two (2), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

and for plaintiff's costs of suit.

Witness my hand and the seal of this Court this 2nd day of February, 1953.

W. L. RIDDLE
Clerk

[Title of District Court of the 16th Judicial District and Cause.]

AMENDED COMPLAINT

Come now the plaintiffs, and for cause of action allege as follows:

First Cause of Action

I.

That the plaintiff, Cedar Creek Oil and Gas Com-

pany, a corporation, is a corporation duly organized, created, and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana;

II.

That the defendant, Fidelity Gas Company, a corporation, is a corporation duly organized, created, and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that defendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the Laws of the State of Delaware, and is duly qualified to do business within the State of Montana;

III.

That the defendant, Shell Oil Company, a corporation, is a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

IV.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947.

That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff Cedar Creek Oil and Gas Company, unknown.

V.

That the plaintiff, Cedar Creek Oil and Gas Company, a corporation, is the holder of government permits and leases on and in the possession and entitled to the possession of lands situated in Fallon County, Montana, which are described as follows, to-wit:

Lease Number 025044-A covering the Southeast Quarter ($SE\frac{1}{4}$), South Half of the Northeast Quarter of the Southwest Quarter ($S\frac{1}{2}$ $NE\frac{1}{4}$ $SW\frac{1}{4}$), South Half of the Southwest Quarter ($S\frac{1}{2}$ $SW\frac{1}{4}$) of Section Twenty-three (23); Northeast Quarter ($NE\frac{1}{4}$) of Section Thirty-five (35), all in Township Eight (8) North Range Fifty-nine (59) East Montana Meridian. Containing 420 Acres.

Lease Number 025044-B covering the North Half ($N\frac{1}{2}$), Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}$ $SW\frac{1}{4}$), North Half of the Northeast Quarter of the Southwest Quarter ($N\frac{1}{2}$ $NE\frac{1}{4}$ $SW\frac{1}{4}$) of Section Twenty-three (23); North Half ($N\frac{1}{2}$), Southeast Quarter ($SE\frac{1}{4}$) of Section Twenty-four; North Half of the Northwest ($N\frac{1}{2}$ $NW\frac{1}{4}$), Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ $NW\frac{1}{4}$), North Half of the Southeast Quarter ($N\frac{1}{2}$

SE $\frac{1}{4}$), Southeast Quarter of the Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Twenty-five (25); Northeast Quarter of the Northwest Quarter (NE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section Thirty-five (35), all in Township Eight (8) North Range Fifty-nine (59), East Montana Principal Meridian. Containing 1,140 Acres.

VI.

That the plaintiff, Cedar Creek Oil and Gas Company, a corporation, is the owner, in the possession, and entitled to the possession of the lands situated in Fallon County, Montana, which are described as follows, to-wit:

Fee Lease, Lots Three (3) and Four (4), South Half of the Northwest Quarter (S $\frac{1}{2}$ NW $\frac{1}{4}$), Southwest Quarter (SW $\frac{1}{4}$) of Section Two (2) in Township Eight (8) North, Range Fifty-nine (59) East, Montana Principal Meridian. Containing 271.45 Acres.

Fee Lease, West Half (W $\frac{1}{2}$) of Section Twelve (12), Township Eight (8) North, Range Fifty-nine (59) East, Montana Principal Meridian. Containing 320 Acres.

VII.

That the defendants claim some right against the lands and leases of the plaintiff, Cedar Creek Oil and Gas Company, a corporation, described above, under and by reason of a lease and operating agreement bearing date of the 7th day of February, 1935 and signed on the 11th day of February, 1935, wherein the plaintiff, Cedar Creek Oil and Gas Company, a corporation, is the party of the first

Quarter of the Southwest Quarter ($N\frac{1}{2}$ $NE\frac{1}{4}$ $SW\frac{1}{4}$) of Section Twenty-three (23); North Half ($N\frac{1}{2}$), Southeast Quarter ($SE\frac{1}{4}$) of Section Twenty-four (24); North Half of the Northwest Quarter ($N\frac{1}{2}$ $NW\frac{1}{4}$), Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ $NW\frac{1}{4}$), North Half of the Southeast Quarter ($N\frac{1}{2}$ $SE\frac{1}{4}$), Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}$ $SE\frac{1}{4}$) of Section Twenty-five (25); Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$ $NW\frac{1}{4}$) of Section Thirty-five (35), all in Township Eight (8) North Range Fifty-nine (59), East Montana Principal Meridian. Containing 1,140 Acres.

VI.

That the plaintiff, Cedar Creek Oil and Gas Company, a corporation, is the owner, in the possession, and entitled to the possession of the lands situated in Fallon County, Montana, which are described as follows, to-wit:

Fee Lease, Lots Three (3) and Four (4), South Half of the Northwest Quarter ($S\frac{1}{2}$ $NW\frac{1}{4}$), Southwest Quarter ($SW\frac{1}{4}$) of Section Two (2) in Township Eight (8), North Range Fifty-nine (59) East, Montana Principal Meridian. Containing 271.45 Acres.

Fee Lease, West Half ($W\frac{1}{2}$) of Section Twelve (12), Township Eight (8) North Range Fifty-nine (59), East Montana Principal Meridian. Containing 320 Acres.

VII.

That the defendants and each of them claim some interest of, in and to the premises described in

Paragraphs V and VI hereof, leased or owned by the plaintiff, Cedar Creek Oil and Gas Company, a corporation, by reason of a certain instrument that is entitled, "Cooperative or Unit Plan of Development, Unit Number 5, Cedar Creek Anticline, Fallon County, Montana," said instrument being executed on or about the 11th day of February, 1935, that the parties to the said instrument were the plaintiffs Cedar Creek Oil and Gas Company, a corporation, and the Gas Development Company, a corporation. That the defendants, Fidelity Gas Company, a corporation, are the assignees and successors in interest of the Gas Development Company, a corporation, in and to said instrument. That defendants claim some right in and to the sands and strata underlying the surface of the land above described by reasons of said instrument and to prospect for and remove oil from said premises, but the claims and interests therein of the defendants, and each of them in and to the said premises and the sands and strata underlying them are without any right, title, or interest whatsoever, and are adverse to and constitute a cloud upon plaintiffs title to the said premises.

Third Cause of Action

I.

That the plaintiff, Mondakota Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Nevada, and is duly qualified to do business within the State of Montana.

II.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that defendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

IV.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest

claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, Mondakota Gas Company unknown.

VI.

That the plaintiff, Mondakota Gas Company, a corporation, is the holder of Government permits and leases on and in the possession and entitled to the possession of lands situated in Fallon County, Montana which are described as follows, to-wit:

Lease Number 025001, covering the Northeast Quarter ($NE\frac{1}{4}$) of Section Twenty-five (25), Township Eight (8), North, Range Fifty-nine (59) East, Montana Principal Meridian.

VI.

That the defendants claim some right against the land and the leases of the plaintiff described above under and by reason of a lease and operating agreement bearing date June 24, 1934, wherein one L. M. Walker is the party of the first part and the defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the land above set forth. That the plaintiff, Mondakota Gas Company, is the assignee of the said L. M. Walker in and to said lease and operating agreement, that said claims and interests to the lands and leases of the plaintiff, Mondakota Gas Company, a corporation, above described by the said defendant and each of them, in and to said premises are without any right, title, or interest whatsoever, and are adverse to and constitute a cloud upon plaintiffs title to said premises.

Fourth Cause of Action

I.

That the plaintiff, Mondakota Gas Company, a corporation, is a corporation duly organized, created, and existing under and by virtue of the laws of the State of Nevada, and is duly qualified to do business within the State of Montana.

II.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that defendant, Montana Dakota Utilities Company, a corporation is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

IV.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Com-

pany, a corporation, are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, Cedar Creek Oil and Gas Company unknown.

V.

That the plaintiff, Mondakota Gas Company, a corporation, is the holder of Government permits and leases on and in the possession and entitled to the possession of lands situated in Fallon County, Montana which are described as follows, to-wit:

Lease Number 025001 covering the Northeast Quarter (NE $\frac{1}{4}$) of Section Twenty-five (25), Township Eight (8) North, Range Fifty-nine (59) East, Montana Principal Meridian.

VI.

That the defendants, and each of them claim some interest in and to the premises described in Paragraph V hereof, leased by the plaintiff, Mondakota Gas Company, by reason of a certain instrument that is entitled, "Cooperative or Unit Plan of Development, Unit Number 5, Cedar Creek Anticline, Fallon County, Montana." Said agreement being executed on or about the 11th day of February, 1935. That the parties to the said instrument were

L. M. Walker and the Gas Development Company, a corporation. That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the assignees and successors in interest of the Gas Development Company, a corporation, in and to said instrument. That defendants claim some right in and to the sands and strata underlying the surface of the land above described, and some right to prospect for and recover oil from said lands by reason of said instrument, but the claims and interests therein of the defendants, and each of them in and to the said premises and the sands and strata underlying them are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon plaintiffs title to the said premises.

Fifth Cause of Action

I.

That the plaintiff, International Trust Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Colorado.

II.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana

Dakota Utilities Company, a corporation; that defendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

IV.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff Cedar Creek Oil and Gas Company, unknown.

V.

That the plaintiff, International Trust Company, a corporation, is the holder of government permits and leases on and in the possession, and entitled to

the possession of lands situated in Fallon County, Montana, which are described as follows, to-wit:

Lease Number 029521 covering the South Half ($S\frac{1}{2}$) of Section Five (5), and the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$ $NW\frac{1}{4}$), the Northeast Quarter ($NE\frac{1}{4}$), the Northeast Quarter of the Southeast Quarter ($NE\frac{1}{4}$ $SE\frac{1}{4}$) of Section Twenty-seven (27), Township Eight (8) North of Range Fifty-nine (59) East of the Montana Principal Meridian.

VI.

That the defendants claim some right against the lands and the leases of the plaintiff, International Trust Company, a corporation described in Paragraph V above, under and by reason of a lease and operating agreement bearing date of the 29th day of June, 1934, wherein one Clarence W. Carter is the party of the first part, and the defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the land above set forth. That the plaintiff, International Trust Company, a corporation, is the assignee of the said Clarence W. Carter in and to said lease and operating agreement, that said claims and interests to the lands and leases of the plaintiff, International Trust Company, a corporation, above described by the defendants and each of them in and to said premises are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiffs' title to said premises.

Sixth Cause of Action

I.

That the plaintiff, International Trust Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Colorado.

II.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation, that defendant, Montana Dakota Utilities Company, a corporation, is a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest

claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, Cedar Creek Oil and Gas Company unknown.

IV.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

V.

That the plaintiff, International Trust Company, a corporation, is the holder of government permits and leases on and in the possession and entitled to the possession of lands situated in Fallon County, Montana, which are described as follows, to-wit:

Lease Number 029521 covering the South Half ($S\frac{1}{2}$) of Section Five (5), and the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$ $NW\frac{1}{4}$), the Northeast Quarter ($NE\frac{1}{4}$), the Northeast Quarter of the Southeast Quarter ($NE\frac{1}{4}$ $SE\frac{1}{4}$) of Section Twenty-seven (27), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

VI.

That the defendants, and each of them claim some interest of, in and to the premises described in Paragraph IV hereof, by reason of a certain instrument that is entitled, "Cooperative or Unit Plan of Development, Unit Number 5, Cedar Creek Anticline, Fallon County, Montana," said instru-

ment being executed on the 11th day of February, 1935. That the parties to the said instrument were Clarence W. Carter and the Gas Development Company, a corporation. The the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the assignees and successors in interest of the said Gas Development Company, a corporation in and to said instrument. That the plaintiff, International Trust Company, a corporation, is the assignee and successor in interest to Clarence W. Carter under the said instrument. That the defendants claim some right in and to the strata underlying the surface of the land above described by reason of said instrument, and the right to prospect for and remove oil from said premises, but the claims and interests therein of the defendants, and each of them, in and to the said premises, and the sands and strata underlying them are without any right, title, or interest whatsoever, and are adverse to and constitute a cloud upon plaintiffs' title to the said premises.

Seventh Cause of Action

I.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that de-

fendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the state of Montana.

II.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, Susan M. Wight unknown.

IV.

That the plaintiff, Susan M. Wight is the holder of Government leases and in the possession and entitled to the possession of the lands situated in Fallon County, Montana which are described as follows, to-wit:

Federal Leases 038815, 021056-A, 021056-B covering the North Half of the North Half ($N\frac{1}{2}$ $N\frac{1}{2}$) of Section Ten (10) Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian. The Southeast Quarter ($SE\frac{1}{4}$) and the South Half of the Northeast Quarter ($S\frac{1}{2}$ $NE\frac{1}{4}$) and the East Half of the Southeast Quarter ($E\frac{1}{2}$ $SE\frac{1}{4}$) of Section Twelve (12), Township Eight (8) North of Range Fifty-nine (59), East of the Montana Principal Meridian.

Government Leases 026954-A, 026954-B covering Lots One, Two, Three, Four (1, 2, 3, 4), the East Half of the Northwest Quarter ($E\frac{1}{2}$ $NW\frac{1}{4}$), and the East Half of the Southwest Quarter ($E\frac{1}{2}$ $SW\frac{1}{4}$) of Section Thirty (30), Township Eight (8), North of Range Sixty (60), East of the Montana Principal Meridian.

V.

That the plaintiff, Susan M. Wight is the owner of, and in the possession, and entitled to the possession of the following land situated in Fallon County, Montana which are described as follows, to-wit:

The Southeast Quarter ($SE\frac{1}{4}$) of Section Eighteen (18), Township Eight North (8) of Range Sixty (60), East of the Montana Principal Meridian.

VI.

That the defendants claim some right against the lands and leases of the plaintiff, Susan M. Wight, described in Paragraphs IV and V above, under

and by reason of a lease and operating agreement made and executed on or about the 1st day of June, 1934, wherein one George Norbeck is the party of the first part, and the defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the land above set forth, but said claims and interests therein of the defendant, and each of them in and to said premises are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiffs title to said premises.

Eighth Cause of Action

I.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that defendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

II.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the

State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, Susan M. Wight, unknown.

IV.

That the plaintiff, Susan M. Wight is the holder of Government leases and in the possession, and entitled to the possession of the lands situated in Fallon County, Montana which are described as follows, to-wit:

Federal Leases 038815, 021056-A, 021056-B covering the North Half of the North Half ($N\frac{1}{2}$ $N\frac{1}{2}$) of Section Ten (10), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian, the Southeast Quarter ($SE\frac{1}{4}$) and the South Half of the Northeast Quarter ($S\frac{1}{2}$ $NE\frac{1}{4}$) and the East Half of the Southeast Quarter ($E\frac{1}{2}$ $SE\frac{1}{4}$) of Section Twelve (12), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

Government Leases 026954-A, 026954-B covering Lots One, Two, Three, Four (1, 2, 3, 4) the East Half of the Northwest Quarter ($E\frac{1}{2}$ NW $\frac{1}{4}$) and the East Half of the Southwest Quarter ($E\frac{1}{2}$ SW $\frac{1}{4}$) of Section Thirty (30), Township Eight (8), North of Range Sixty (60), East of the Montana Principal Meridian.

V.

That the plaintiff, Susan M. Wight is the owner of, and in the possession, and entitled to the possession of the following land situated in Fallon County, Montana which are described as follows, to-wit:

The Southeast Quarter ($SE\frac{1}{4}$) of Section Eighteen (18), Township Eight (8), North of Range Sixty (60) East of the Montana Principal Meridian.

VI.

That the defendants *in each of them* claim some interest of, in and to the premises described in Paragraphs IV and V above by reason of a certain instrument that is entitled, "Cooperative or Unit Plan of Development, Unit Number 5, Cedar Creek Anticline, Fallon County, Montana", said instrument being executed or or about the 7th day of February, 1935. That the parties to the said instrument were one George Norbeck and the Gas Development Company, a corporation. That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the assignees and successors in interest of the Gas Development Company, a corporation, in and

to the said instrument. That the defendants claim some right in and to the sands and strata underlying the surface of the land above described by reason of said instrument, and the right to prospect for and remove oil from said premises. That the claims and interests therein of the defendant, and each of them and to said premises and the sands and strata underlying them are without any right, title, or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiffs' title to said premises.

Ninth Cause of Action

I.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that defendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

II.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, H. C. Smith unknown.

IV.

That the plaintiff, H. C. Smith is the holder of Government Leases and in the possession, and entitled to the possession of the lands situated in Fallon County, Montana which are described as follows, to-wit:

Government Lease Number 029750-A and 029750-B covering Lots One, Two, Three, Four (1, 2, 3, 4), South Half of the North Half (S $\frac{1}{2}$ N $\frac{1}{2}$), Section Four (4), Township Eight (8) North Range Fifty-nine (59), East of the Montana Principal Meridian.

213/360ths interest in Government Lease Number 034165 covering the Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Eight (8), and Lot One (1) and the Southeast Quarter of the Northeast Quarter (SE $\frac{1}{4}$ NE $\frac{1}{4}$) of Section Six (6), all in Township Eight (8), North of Range

Fifty-nine (59), East of the Montana Principal Meridian.

213/360th interest in Government Lease Number 034166 covering Lots One and Two (1, 2), South Half of the Northeast Quarter ($S\frac{1}{2} NE\frac{1}{4}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section Two (2), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

Government Lease Number 038253 covering Southeast Quarter ($SE\frac{1}{4}$) of Section Thirteen (13), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian.

V.

That the defendants claim some right against the lands and leases of the plaintiff, H. C. Smith described above as Government Leases 029750-A and 029750-B, covering Lots One, Two, Three, Four (1, 2, 3, 4) and the South Half of the North Half ($S\frac{1}{2} N\frac{1}{2}$) of Section four (4), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian, under and by reason of a lease and operating agreement bearing the date of the 12th day of June, 1934, wherein one John Wight is the party of the first part, and defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the land above set forth, but said claims and interests therein of the defendants, and each of them in and to said premises are without any right, title, or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiffs' title to said premises.

That the defendants claim some right against the land and the leases of the plaintiff, H. C. Smith, described above as Government Lease 034165 and 034166 covering the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4} SE\frac{1}{4}$) of Section Eight (8), Lot One (1), and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4} NE\frac{1}{4}$) of Section Six (6) all in Township Eight (8) North of Range Fifty-nine (59), East of Montana Principal Meridian, and Lots One and Two (1, 2), the South Half of the Northeast Quarter ($S\frac{1}{2} NE\frac{1}{4}$), and the Southeast Quarter ($SE\frac{1}{4}$) of Section Two (2), in Township Eight (8), North of Range Fifty-nine (59) East, under and by reason of a lease and operating agreement made and executed on or about the 22nd day of February, 1935, wherein C. M. Adams is the party of the first part, and the defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the land above set forth, but said claims and interests therein of the defendant, and each of them in and to said premises are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiffs title to said premises.

That the defendants claim some right against the land and leases of the plaintiffs H. C. Smith described above as Government Leases 038253 covering the Southeast Quarter ($SE\frac{1}{4}$) of Section Thirteen (13), Township Eight (8) North of Range Fifty-nine (59), East of the Montana Principal Meridian, under and by reason of a lease and oper-

ating agreement made and executed on or about the 16th day of May, 1934, wherein one George Norbeck is the party of the first part and the defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the land above set forth. That said claims and interests therein of the defendant, and each of them in and to said premises are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiffs' title to said premises.

Tenth Cause of Action

I.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that defendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

II.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the

State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, Cedar Creek Oil and Gas Company, unknown.

IV.

That the plaintiff, H. C. Smith is the holder of Government Leases and in the possession and entitled to the possession of the lands situated in Fallon County, Montana which are described as follows, to-wit:

Government Lease Number 029750-A and 029750-B covering Lots One, Two, Three, Four (1, 2, 3, 4), South Half of the North Half (S $\frac{1}{2}$ N $\frac{1}{2}$), Section Four (4), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian.

213/360th interest in Government Lease Number 034165 covering the Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Eight (8), and Lot One (1) and the Southeast Quarter of

the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section Two (2), all in Township Eight (8), North of Range Fifty-nine (59), East of Montana Principal Meridian.

213/360th interest in Government Lease Number 034166 covering Lots One and Two (1, 2), South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section Six (6), all in Township Eight (8), North of Range Fifty-nine (59), East of Montana Principal Meridian.

Government Lease Number 038253 covering the Southeast Quarter ($SE\frac{1}{4}$) of Section Thirteen (13), Township Eight (8), North Range Fifty-nine (59) East of the Montana Principal Meridian.

V.

That the defendants, and each of them claim some interest in and to the lands and leases of the plaintiff, H. C. Smith, described heretofore as Government Lease 029750-A and 029750-B covering Lots One, Two, Three, Four (1, 2, 3, 4), South Half of the North Half ($S\frac{1}{2}N\frac{1}{2}$) of Section Four (4), Township Eight (8), North of Range Fifty-nine (59), East, by reason of a certain instrument that is entitled, "Cooperative or Unit Plan of Development, Unit Number 5, Cedar Creek Anticline, Fallon County, Montana", said instrument being executed on or about the 7th day of February, 1935. That the parties to the said instrument were John Wight and the Gas Development Company, a corporation. That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation are the assignees and suc-

cessors in interest of the Gas Development Company, a corporation, in and to said instrument. That the defendants claim some right in and to the sands and strata underlying the surface of the land above described by reason of said instrument, and the right to prospect for and remove oil from said premises. That the claims and interests therein of the defendants, that each of them in and to the said premises and the sand and strata underlying them are without any right, title, or interest whatsoever and are adverse to and constitute a cloud upon said plaintiff's title to said premises.

That the defendants, and each of them claim some interest in and to the lands and leases of the plaintiff, H. C. Smith, described above as Government Leases 034165 and 034166 covering the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section Eight (8), and Lot One (1) and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section Six (6), all in Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian, and Lots One and Two (1, 2) and the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section Two (2), in Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian by reason of a certain instrument that is entitled, "Cooperative or Unit Plan of Development, Unit Number 5, Cedar Creek Anticline, Fallon County, Montana", said instrument being executed on or about the 7th day of February, 1935. That the parties to the said instrument were one

C. M. Adams and the Gas Development Company, a corporation. That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation are the assignees and successors in interest of the said Gas Development Company, a corporation, in and to said instrument. That the defendants claim some right in and to the sands and strata underlying the surface of the land above described by reason of said instrument, and the right to prospect for and remove oil from said premises. That the claims and interests therein of the defendant and each of them, in and to the said premises and the sands and strata underlying them are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon plaintiffs' title to the said premises.

That the defendants, *in each of them* claim some interest in and to the lands and leases of the plaintiff, H. C. Smith, described above as Government Lease Number 0381253, covering the Southeast Quarter (SE $\frac{1}{4}$) of Section Thirteen (13), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian, by reason of a certain instrument that is entitled, "Cooperative or Unit Plan of Development, Unit Number 5, Cedar Creek Anticline, Fallon County, Montana", said instrument being executed on or about the 7th day of February, 1935. That the parties of the said instrument were one George Norbeck and the Gas Development Company, a corporation. That the defendants, Fidelity Gas Company, a corporation and Montana Dakota Utilities Company, a corporation

are the assignees and successors in interest of the Gas Development Company, a corporation in and to said instrument, that defendants claim some right in and to the said sand and strata underlying the surface of the land above described, and some right to prospect for and recover oil from said land, but the claims and interests therein of the defendant, and each of them in and to the said premises and the sands and strata underlying them are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon plaintiffs' title to the said premises.

Eleventh Cause of Action

I.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

II.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the

State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, *H. B. Haney*, unknown.

IV.

That the plaintiff, *W. B. Haney*, is the holder of Government Leases, and in the possession, and entitled to the possession of lands situated in Fallon County, Montana which are described as follows, to-wit:

Government Lease 037591 covering the West Half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) and the Southwest Quarter ($SW\frac{1}{4}$) of Section Thirteen (13), Township Eight (8) North Range Fifty-nine (59), East of the Montana Principal Meridian.

63/360ths interest in Government Lease Number 034165 covering the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section Eight (8) and Lot One (1) and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section Six

(6), all in Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

63/360ths interest in Government Lease Number 034166 covering Lots One and Two (1, 2), the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$), and the Southeast Quarter ($SE\frac{1}{4}$) of Section Two (2), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

V.

That the defendants claim some right against the lands and leases of the plaintiff, W. B. Haney, described above as Government Leases 037591 covering the West Half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) and the Southwest Quarter ($SW\frac{1}{4}$) of Section Thirteen (13), Township Eight (8) North Range Fifty-nine (59), East of the Montana Principal Meridian, under and by reason of a lease and operating agreement made and executed on or about the 16th day of May, 1934, wherein one George Norbeck is the party of the first part, and the defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the lands above set forth. That said claims and interests therein of the defendants, and each of them in and to said premises are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiff's title to his said premises.

VI.

'That the defendants claim some right against the

lands and leases of the plaintiff, W. B. Haney, described above as Government Leases 034165 and 034166, covering Lot One (1), in the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section Six (6), and the Northwest Quarter ($NW\frac{1}{4}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian and the East Half ($E\frac{1}{2}$) of Section Two (2), Township Eight (8), North Range Fifty-nine (59) East, under and by reason of a lease and operating agreement made and executed on or about the 22nd day of February, 1935 wherein C. M. Adams is the party of the first part and the defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the land above set forth. That said claims and interests therein of the defendant, and each of them in and to said premises are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiff's title to said premises.

Twelfth Cause of Action

I.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that de-

fendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

II.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, W. B. Haney, unknown.

IV.

That the plaintiff, W. B. Haney, is the holder of Government Leases and in the possession, and entitled to the possession of lands situated in Fallon County, Montana which are described as follows, to-wit:

Government Lease 037591 covering the West Half

of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) and the Southwest Quarter ($SW\frac{1}{4}$) of Section Thirteen (13), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian.

63/360ths interest in Government Lease Number 034165 covering the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section Eight (8) and Lot One (1) and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section Six (6) all in Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

63/360ths interest in Government Lease Number 034166 covering Lots One and Two (1, 2), the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section Two (2), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

1.

Wherefore: Plaintiff, Cedar Creek Oil and Gas Company, a corporation, prays that the defendants, and each of them be required to appear and set forth their claim, if any they have of, in or to the leases and premises set forth in Paragraphs V and VI of the First Cause of Action, and Paragraphs V and VI of the Second Cause of Action herein, and that after trial had, herein, the Court find that the plaintiff, Cedar Creek Oil and Gas Company, a corporation, is the owner, in the possession and entitled to the possession of said leases and properties, and entitled to have its title quieted thereto, as against the defendants, and all other persons un-

known, claiming, or who may claim any right, title, estate or interest in, or lien or encumbrance upon the said real property and leases, or any thereof adverse to plaintiff's ownership, or any cloud upon plaintiffs' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate, or accrued.

2.

Plaintiff, Mondakota Gas Company, a corporation, prays that the defendants, and each of them be required to appear and set forth their claims, if any they have, of, in or to the leases and premises described in Paragraph IV of the Third Cause of Action, and Paragraph V of the Fourth Cause of Action, and that after trial had, herein, the Court find, that the plaintiff, Cedar Creek Oil and Gas Company, a corporation, is the owner, in the possession, and entitled to the possession of said leases and properties, and entitled to have its title quieted thereto, as against the defendants, and all other persons unknown, claiming or who may claim any right, title, estate, or interest in, or lien or encumbrance upon the said real property and leases, any thereof adverse to plaintiffs' ownership, or any cloud upon plaintiffs' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate, or accrued.

3.

Plaintiff, International Trust Company, a corporation, prays that the defendants, and each of them

be required to appear and set forth their claims, if any they have, of, in or to the leases and premises set forth in Paragraph V of the Fifth Cause of Action and Paragraph V of the Sixth Cause of Action, and after trial had, herein, the Court find that the plaintiff, International Trust Company, a corporation, is the owner, in the possession and entitled to the possession of said leases and properties, and entitled to have its title quieted thereto, as against the defendants, and all other persons unknown, claiming or who may claim any right, title, estate or interest in, or lien or encumbrance upon the said real property and leases, or any thereof adverse to plaintiffs' ownership, or any cloud upon plaintiffs' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued.

4.

Plaintiff, Susan M. Wight prays that the defendants, and each of them be required to appear and set forth their claim, if any they have of, in or to the leases and premises set forth in Paragraphs IV and V of the Seventh Cause of Action, and Paragraphs IV and V of the Eighth Cause of Action, and after trial had, herein, the Court find that the plaintiff, Susan M. Wight is the owner, in the possession and entitled to the possession of said leases and properties, and entitled to have its title quieted thereto, as against the defendants, and all other persons unknown, claiming, or who may claim any right, title, estate or interest in, or lien or

encumbrance upon the said real property and leases, or any thereof adverse to plaintiffs' ownership, or any cloud upon plaintiffs' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued.

5.

Plaintiff, H. C. Smith, prays that the defendants, and each of them be required to appear and set forth their claim, if any they have, of, in or to the leases and premises set forth in Paragraphs IV and V of the Ninth Cause of Action, and Paragraphs IV and V of the Tenth Cause of Action hereof, and that after trial had, herein, the Court find that the plaintiff, H. C. Smith is the owner, in the possession and entitled to the possession of said leases and properties, and entitled to have its title quieted thereto, as against the defendants, and all other persons unknown, claiming, or who may claim any right, title, estate or interest in, or lien or encumbrance upon the said real property and leases, or any thereof adverse to plaintiffs' ownership, or any cloud upon plaintiffs' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued.

6.

Plaintiff, W. B. Haney, prays that the defendants, and each of them be required to appear and set forth their claim, if any they have, of, in or to the leases and premises set forth in Paragraphs

IV and V of the Eleventh Cause of Action, and Paragraphs IV and V of the Twelfth Cause of Action hereof, and that after trial had, herein, the Court find that the plaintiff, W. B. Haney is the owner, in the possession, and entitled to have its title quieted thereto, as against the defendants, and all other persons unknown, claiming, or who may claim any right, title, estate or interest in, or lien or encumbrance upon the said real property and leases, or any thereof adverse to plaintiffs' ownership, or any cloud upon plaintiffs' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued.

7.

Plaintiffs pray costs of suit.

LEIF ERICKSON,

Attorney for the Plaintiffs

Duly Verified.

[Endorsed]: Filed February 25, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants and move the court to dismiss the action because the complaint and each cause of action therein fail to state claims against the defendants upon which relief can be granted.

Dated this 13th day of March, 1953.

COLEMAN, JAMESON & LAMEY,
/s/ By COLE CROWLEY,
A member of the firm,
Attorneys for Defendants

Of Counsel for Defendants Fidelity Gas Company
and Montana Dakota Utilities Company: Armin
Johnson, Faegre & Benson, Raymond Hilde-
brand.

[Endorsed]: Filed March 14, 1953.

[Title of District Court and Cause.]

ORDER OF DISQUALIFICATION

In the foregoing entitled cause, recently removed from the State Court to the above named court and the Billings Division thereof, the undersigned, one of the Judges of said Court, having given due consideration thereto, does not believe that he can preside in said cause with such absolute impartiality as the law requires, and, therefore, it is ordered that said cause be referred to Honorable W. D. Murray, the other Judge of said Court in said District, for hearing and decision.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed, entered, and noted in Civil Docket March 20, 1953. H. H. Walker, Clerk. By C. G. Kegel, Deputy.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO REMAND

The Motion to Remand of the plaintiffs, having been submitted to the Court upon briefs, and the Court having considered said Motion and the Complaint herein, together with the briefs of the parties, and it appearing to the Court that the Third, Fifth, Seventh, Ninth and Eleventh causes of action in said complaint each allege a separate and independent cause of action which can be fully adjudicated between the respective plaintiffs in each of said causes of action and the defendants, without the presence of any other necessary or indispensable party, and that in each of such causes of action there is diversity of citizenship between the respective plaintiffs and all of the defendants, and the amount in controversy, exclusive of interest and costs, exceeds \$3,000.00;

Now, therefore, it is ordered and this does order that the Motion to Remand be, and the same hereby is denied.

Dated at Butte, Montana, this 27th day of May, 1953.

/s/ W. D. MURRAY,

United States District Judge

[Endorsed]: Filed May 27, 1953. Entered and Noted in Civil Docket May 28, 1953.

and effect and binding upon plaintiff, Cedar Creek Oil and Gas Company, and deny that the claims of the defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and other other allegation contained in the first cause of action of the amended complaint.

Third Defense

That relying upon said Gas Unit Agreement, Fidelity Operating Agreement and similar agreements with other owners, lessees, and holders of interests in lands in the Cedar Creek Anticline, the defendants have carried on extensive and expensive geological and geophysical work on the lands described therein and on all lands in the Cedar Creek Anticline; that also relying thereon the defendants have expended large sums of money in carrying on drilling operations and development work on the lands claimed by the plaintiff and most of the land in the Cedar Creek Anticline, all of which has resulted in the production and sale of large quantities of gas from said lands and from most of the other lands within the Cedar Creek Anticline; that from said production and sales of gas the plaintiff has received and retained monetary and other benefits; that said drilling, exploration and development work has also resulted in the discovery and production of oil in the Cedar Creek Anticline; that the development thereof is now being, and for many years has been, carried on; that as the result of the geological and geophysical work and the drill-

ing, exploration and development as aforesaid, the value of all lands in the Cedar Creek Anticline, and in particular the lands claimed by the plaintiff, has been tremendously enhanced and its value as potential oil producing land has been demonstrated; that the said lands lie near the center of said Cedar Creek Anticline and if the relief prayed for in plaintiff's amended complaint is granted, the future development for the production of oil in the Cedar Creek Anticline, as now planned and carried on by the defendants, will be seriously impaired and much of the benefit of the defendants' work and expenditures, as hereinbefore alleged, will be lost.

That during the many years that the defendants have carried on the work and activities and made the expenditures as herein alleged, the plaintiff, notwithstanding its knowledge thereof, has failed to assert any claim that the Gas Unit Agreement or the Fidelity Operating Agreement were not in full force and effect; that it was not until the value of said land had been greatly enhanced and its oil producing possibilities were demonstrated by the work and expenditures of the defendants that any assertion was made by the plaintiff that said agreements were no longer in effect.

That because of the foregoing plaintiff is estopped from obtaining the relief sought in its complaint with respect to the premises described therein.

Fourth Defense

That by reason of the facts set out in the Third

Defense plaintiff has waived any right to obtain the relief sought in its complaint with respect to the premises described therein.

Fifth Defense

That by reason of the facts set out in the Third Defense, plaintiff is guilty of laches and barred from obtaining the relief sought in its complaint with respect to the premises described therein.

Answer to Second Cause of Action

As and for their answer to the second cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The second cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Admit the allegations contained in Paragraphs I, II and III; answering Paragraph IV admit that defendant, Shell Oil Company, claims some interest in the land and leases described; deny the remaining allegations of Paragraph IV and all of the allegations of Paragraphs V and VI.

Answering Paragraph VII defendants allege that they are in possession of and claim rights in and to the lands and leases described in the said second cause of action by reason of the following agreements:

(Said agreements are the same and identical

with agreements numbered one through five and referred to and described in the second defense to the first cause of action.)

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, Cedar Creek Oil and Gas Company, and deny that the claims of the defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the second cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Third Cause of Action

As and for their answer to the third cause of action of the amended complaint herein, defendants Fidelity Gas Co. and Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The third cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I, II, and III of the third cause of action of the amended complaint; answering Paragraph IV admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof; allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first paragraph numbered VI, which is in fact Paragraph V of the third cause of action, and therefore deny the same.

Answering the second paragraph of the third cause of action bearing number "VI", defendants allege that they are in possession of and claim rights in and to the lands and leases described in the said third cause of action by reason of the following agreements:

1. Fidelity Operating Agreement dated May 24, 1934, between L. M. Walker and defendant Fidelity Gas Co., said agreement covering among other

lands the same lands referred to in the first paragraph numbered VI in the third cause of action and which with the exception of the name and address of the party of the first part, the date and the description of lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof. '

2. Fidelity Operating Agreement dated October 16, 1936, between Atlantic Pacific Oil Company of Montana and defendant Fidelity Gas Co., said agreement covering among other lands the same lands referred to in the first paragraph numbered VI in the third cause of action and which, with the exception of the name and address of the party of the first part, the date and the description of lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

3. Gas Unit Agreement dated May 26, 1934, between L. M. Walker and Gas Development Company, said agreement covering among other lands the same lands referred to in the first paragraph numbered VI in the third cause of action and which, with the exception of the names of the contracting parties other than said Gas Development Company, description of properties, percentage figures of participation and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

4. Gas Unit Agreement between Atlantic Pacific Oil Company of Montana and Gas Development

Company, said agreement covering among other lands the same lands referred to in the first paragraph numbered VI in the third cause of action and which, with the exception of the names of the contracting parties other than said Gas Development Company, description of properties, percentage figures of participation and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

5. Gas Purchase Agreement dated May 26, 1934, between L. M. Walker and Gas Development Company, said agreement covering among other lands the same lands referred to in the first paragraph numbered VI in the third cause of action, and which with the exception of the name and address of the party of the first part, the date and description of the lands therein contained, term, and address of "Vendor" where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

6. Gas Purchase Agreement dated October 17, 1939, between Leona M. Walker, John Wight and Susan Wight, and Montana-Dakota Utilities Co., said agreement covering among other lands the same lands referred to in the first paragraph numbered VI in the third cause of action, and which with the exception of the names and addresses of the parties, the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

7. Operating Agreement, dated April 10, 1951, by and between defendants, Montana-Dakota Utili-

ties Co., Fidelity Gas Co. and Shell Oil Company, a true copy of which is attached hereto and marked Exhibit "D" and hereby made a part hereof.

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, Mondakota Gas Company, and deny that the claims of the defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the third cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Fourth Cause of Action

As and for their answer to the fourth cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The fourth cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I, II and III of the fourth cause of action of the amended complaint; answering Paragraph IV admit that the defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof; allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V thereof and therefore deny the same.

Answering Paragraph VI of the fourth cause of action defendants allege that they are in possession of and claim rights in and to the lands and leases described in the fourth cause of action by reason of the following agreements:

(Said agreements are the same and identical with agreements numbered one through seven and referred to and described in the second defense to the third cause of action.)

That defendants, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas De-

velopment Company under the agreements referred to above.

Allege that said agreements are in full force and effect and binding upon plaintiff, Mondakota Gas Company, and deny that the claims of defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the fourth cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Fifth Cause of Action

As and for their answer to the fifth cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The fifth cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I, II and III of the fifth cause of action of the amended complaint; answering Paragraph IV admit that defendant Shell Oil Company claims some interest in the lands and leases described and deny the remaining allegations thereof; in answer to Paragraph V thereof, defendants allege that plaintiff The International Trust Company is the assignee of the government lease of the lands therein described, but defendants deny that said plaintiff is in possession or entitled to possession of said lands.

Answering Paragraph VI of the fifth cause of action, defendants allege that they are in possession of and claim rights in and to the property described therein by reason of the following agreements:

1. Fidelity Operating Agreement dated May 29, 1934, between Clarence W. Carter and Josie A. Carter and defendant Fidelity Gas Co., said agreement covering the same lands referred to in paragraph V of the fifth cause of action and with the exception of the name and address of the party of the first part, the date and the description of lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

2. Fidelity Operating Agreement dated October 16, 1936, between Atlantic Pacific Oil Company of Montana and defendant Fidelity Gas Co., said agreement covering the same lands referred to in paragraph V of the fifth cause of action and with the exception of the name and address of the party of the first part, the date and the description of lands therein contained and the designation the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

3. Gas Unit Agreement dated January 11, 1935, between Clarence W. Carter and Josie A. Carter and Gas Development Company, said agreement covering the same lands referred to in paragraph V of the fifth cause of action and with the exception of the names of the contracting parties other than said Gas Development Company, description of properties, percentage figures of participation and the date, and place of execution, said agreement is identical with Exhibit "B" hereof.

4. Gas Unit Agreement dated October 16, 1936, between Atlantic Pacific Oil Company of Montana and Gas Development Company, said agreement covering the same lands referred to in paragraph V of the fifth cause of action and with the exception of the names of the contracting parties other than said Gas Development Company, description of properties, percentage figures of participation and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

5. Gas Purchase Agreement dated October 1, 1934, between Clarence W. Carter and Josie A.

Carter and Gas Development Company, said agreement covering the same lands referred to in paragraph V of the fifth cause of action, and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained, term, and address of "Vendor" where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

6. Gas Purchase Agreement dated October 16, 1936, between Atlantic Pacific Oil Company of Montana and Montana-Dakota Utilities Co., said agreement covering the same lands referred to in paragraph V of the fifth cause of action, and which with the exception of the names and addresses of the parties, the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

7. Gas Purchase Agreement dated October 6, 1939, between Clarence W. Carter, Josie A. Carter, John Wight, Susan Wight, Estate of Eugenia Stults by John Wight, administrator, and Montana-Dakota Utilities Co., said agreement covering the same lands referred to in paragraph V of the fifth cause of action, and with the exception of the names and addresses of the parties, the dates, and description of the lands therein contained and the address of the "Vendor" where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

8. Operating Agreement, dated April 10, 1951, by and between defendants, Montana-Dakota Utilities Co., Fidelity Gas Co. and Shell Oil Company, a

true copy of which is attached hereto and marked Exhibit "D" and hereby made a part hereof.

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, International Trust Company, and deny that the claims of the defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the fifth cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Sixth Cause of Action

As and for their answer to the sixth cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The sixth cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I, II and IV of the sixth cause of action of the amended complaint; answering Paragraph III admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof; and in answer to Paragraph V thereof, defendants allege that plaintiff, International Trust Company, is the assignee of the government lease of the lands therein described, but defendants deny that said plaintiff is in possession or entitled to possession of said lands.

Answering Paragraph VI of the sixth cause of action, defendants allege that they are in possession of and claim rights in and to the property described in the said sixth cause of action by reason of the following agreements:

(Said agreements are the same and identical with agreements numbered one through eight and referred to and described in the second defense to the fifth cause of action.)

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, International Trust Company, and deny that the claims of the defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the sixth cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Seventh Cause of Action

As and for their answer to the seventh cause of

action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The seventh cause of action of the amended complaint fails to state claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I and II of the seventh cause of action of the amended complaint; answering Paragraph III admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof; allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs IV and V thereof and therefore deny the same.

Answering Paragraph VI of the said seventh cause of action, defendants allege that they are in possession of and claim rights in and to the property described in the seventh cause of action by reason of the following agreements:

1. Fidelity Operating Agreement dated May 16, 1934, between George Norbeck and Jane M. Norbeck to Fidelity Gas Co., said agreement covering among other lands the same lands referred to in the second paragraph of paragraph IV of the seventh cause of action and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained, and

the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

2. Fidelity Operating Agreement dated February 27, 1935, between George Norbeck and Jane M. Norbeck to Fidelity Gas Co., said agreement covering among other lands, the same lands referred to in the third paragraph of paragraph IV of the seventh cause of action and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained, and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

3. Fidelity Operating Agreement dated February 5, 1935, between Susie Beck, Al Hanson, Louise Hanson, Norbeck Company and Fidelity Gas Co., said agreement covering among other lands the same lands referred to in paragraph V of the seventh cause of action and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained, and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

4. Gas Unit Agreement dated May 19, 1934, between George Norbeck, Jane M. Norbeck and Gas Development Company, said agreement covering among other lands the same lands referred to in the second paragraph of paragraph IV of the seventh cause of action and with the exception of the names of the contracting parties other than Gas Develop-

ment Company, description of properties, percentage figures of participation and the date and place of execution said agreement is identical with Exhibit "B" hereof.

5. Gas Unit Agreement dated February 27, 1935, between George Norbeck, Jane M. Norbeck and Gas Development Company, said agreement covering among other lands the same lands referred to in the third paragraph of paragraph IV of the seventh cause of action and with the exception of the names of the contracting parties other than Gas Development Company, description of properties, percentage figures of participation and the date and place of execution said agreement is identical with Exhibit "B" hereof.

6. Gas Unit Agreement dated January 8, 1935, between Susie Beck, Al Hanson, Louise Hanson and Norbeck Company and Gas Development Company, said agreement covering among other lands the same lands referred to in paragraph V of the seventh cause of action and with the exception of the names of the contracting parties other than Gas Development Company, description of properties, percentage figures of participation and date and place of execution said agreement is identical with Exhibit "B" hereof.

7. Gas Purchase Agreement dated May 16, 1934, between George Norbeck, Jane M. Norbeck and Gas Development Company, said agreement covering among other lands the same lands referred to in the second paragraph of paragraph IV of the seventh cause of action and with the exception of the name

of the vendor, the dates and description of the lands therein contained, the term, and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

8. Gas Purchase Agreement dated October 16, 1939, between John Wight, Susan Wight and Montana-Dakota Utilities Company, said agreement covering among other lands the same lands referred to in the second paragraph of paragraph IV of the seventh cause of action and with the exception of the names of the parties, the dates and description of the lands therein contained, and the address of "vendor" where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

9. Gas Purchase Agreement, dated February 27, 1935, between George Norbeck, Jane M. Norbeck and Gas Development Company, said agreement covering among other lands the same lands referred to in the third paragraph of paragraph IV of the seventh cause of action and with the exception of the names of the parties, the dates and description of the lands therein contained, and the address of "Vendor" where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

10. Gas Purchase Agreement, dated January 8, 1935, between Susie Beck, Al Hanson, Louise Hanson, Norbeck Company and Gas Development Company said agreement covering among other lands, the same lands referred to in paragraph V of the seventh cause of action and with the exception of the names of the parties, the dates and description of the lands therein contained, and the address of

“Vendor” where notices are to be sent, said agreement is identical with Exhibit “C” hereof.

11. Operating Agreement, dated April 10, 1951, by and between defendants, Montana-Dakota Utilities Co., Fidelity Gas Co. and Shell Oil Company, a true copy of which is attached hereto and marked Exhibit “D” and hereby made a part hereof.

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, Susan M. Wight and deny that the claims of the defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the seventh cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Eighth Cause of Action

As and for their answer to the eighth cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The eighth cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I and II of the eighth cause of action of the amended complaint; answering paragraph III admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof; allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs IV and V thereof and therefore deny the same.

Answering Paragraph VI of the eighth cause of action, defendants allege that they are in possession of and claim rights in and to the property described in said eighth cause of action by reason of the following agreements:

(Said agreements are the same and identical

with agreements numbered one through eleven and referred to and described in the seventh cause of action.)

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, Susan M. Wight, and deny that the claims of the defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the eighth cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Ninth Cause of Action

As and for their answer to the ninth cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The ninth cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I and II of the ninth cause of action of the amended complaint; answering Paragraph III admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof. In answer to Paragraph IV thereof, defendants allege that plaintiff H. C. Smith is the assignee of Government Leases Nos. Bl. 029750-A and 029750-B of the lands described in said Paragraph IV under said leases; allege that said plaintiff H. C. Smith holds a fractional interest, $213/360$ ths, of Government Leases Nos. Bl. 034165 and 034166 of the lands described in said Paragraph IV under said leases; and said plaintiff H. C. Smith holds by assignment, the rights of lessee to the SE $1/4$ of Section 13, Township 8 North, Range 59 East of the Montana Principal Meridian to which property the number Bl. 038253 has been assigned; defendants deny that plaintiff H. C. Smith is in possession or entitled to possession of any of said lands.

Answering Paragraph V of the Ninth Cause of Action, defendants allege that they are in possession of and claim rights in and to the properties described therein by reason of the following agreements:

1. Fidelity Operating Agreement dated June 12, 1934, between John Wight and defendant Fidelity Gas Co., said agreement covering the lands referred to in the second paragraph of paragraph IV of the ninth cause of action and with the exception of the name and address of the party of the first part, the date and description of lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

2. Fidelity Operating Agreement, dated June 10, 1934, between C. M. Adams, J. H. Adams and defendant Fidelity Gas Co., said agreement covering among other lands the same lands referred to in the third and fourth paragraphs of paragraph IV of the ninth cause of action and with the exception of the name and address of the party of the first part, the date and description of lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

3. Fidelity Operating Agreement dated May 16, 1934, between George Norbeck and Jane M. Norbeck and defendant Fidelity Gas Co. said agreement covering among other lands the same lands referred to in the fifth paragraph of paragraph IV of the ninth cause of action and with the exception

of the name and address of the party of the first part, the date and description of lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

4. Gas Unit Agreement dated Jan. 22, 1935, between C. M. Adams, J. H. Adams and Gas Development Co., said agreement covering among other lands the same lands referred to in the third and fourth paragraphs of paragraph IV of the ninth cause of action and with the exception of the names of the contracting parties other than Gas Development Company, description of the properties, percentage figures of participation and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

5. Gas Unit Agreement, dated June 11, 1934, between John Wight, Susan Wight, and Gas Development Company, said agreement covering among other lands the same lands referred to in the second paragraph of paragraph IV of the ninth cause of action and with the exception of the names of the contracting parties other than Gas Development Company, description of the properties, percentage figures of participation and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

6. Gas Unit Agreement dated May 16, 1934, between George Norbeck, Jane M. Norbeck and Gas Development Company, said agreement covering among other lands the same lands referred to in the fifth paragraph of paragraph IV of the ninth cause

of action and with the exception of the names of the contracting parties other than Gas Development Company, description of the properties, percentage figures of participation and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

7. Gas Purchase Agreement dated July 10, 1934, between C. M. Adams, J. H. Adams and Gas Development Company, said agreement covering among other lands the same lands referred to in the third and fourth paragraphs of paragraph IV of the ninth cause of action, and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

8. Gas Purchase Agreement dated December 19, 1939, between Black Hills Gas and Oil Company and Montana-Dakota Utilities Co., said agreement covering among other lands, except for Lot One (1) of Section Six, Township 8 N., Range 59 E M.P.M., the same lands referred to in the third and fourth paragraphs of paragraph IV of the ninth cause of action, and with the exception of the names and addresses of the parties the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

9. Gas Purchase Agreement dated June 11, 1934, between John Wight and Gas Development Company, said agreement covering the same lands re-

ferred to in the second paragraph of paragraph IV of the ninth cause of action, and with the exception of the names of the party of the first part, term, the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

10. Gas Purchase Agreement dated December 19, 1939, between W. B. Haney, Mabel G. Haney and Montana-Dakota Utilities Co., said agreement covering the same lands referred to in the second paragraph of paragraph IV of the ninth cause of action, and with the exception of the names and addresses of the parties, the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

11. Gas Purchase Agreement dated May 16, 1934, between George Norbeck and Jane M. Norbeck and Gas Development Company, said agreement covering among other lands the same lands referred to in the fifth paragraph of paragraph IV of the ninth cause of action, and with the exception of the name and address of the party of the first part, term, the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

12. Gas Purchase Agreement, dated March 4, 1940, between Herman C. Smith, Dephene Smith and Montana-Dakota Utilities Co., said agreement covering the same land referred to in the fifth para-

graph of paragraph IV of the ninth cause of action, and with the exception of the names and addresses of the parties, the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

13. Operating Agreement, dated April 10, 1951, by and between defendants, Montana-Dakota Utilities Co., and Shell Oil Company, a true copy of which is attached hereto and marked Exhibit "D" and hereby made a part hereof.

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are in full force and effect and binding upon plaintiff, H. C. Smith, and deny that the claim of defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the ninth cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the

first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Tenth Cause of Action

As and for their answer to the tenth cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The tenth cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I and II of the tenth cause of action of the amended complaint; answering Paragraph III admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof. In answer to Paragraph IV thereof, defendants allege that plaintiff H. C. Smith is the assignee of Government Leases Nos. Bl. 029750-A and 029750-B of the lands described in said Paragraph IV under said leases; allege that said plaintiff H. C. Smith holds a fractional interest, $213/360$ ths, of Government Leases Nos. Bl. 034165 and 034166 of the lands described

in said Paragraph IV under said leases; and said plaintiff H. C. Smith holds by assignment, the rights of lessee to the SE $\frac{1}{4}$ of Section 13, Township 8 North, Range 59 East of the Montana Principal Meridian to which property the number Bl. 038253 has been assigned; defendants deny that plaintiff H. C. Smith is in possession or entitled to possession of any of said lands.

Answering Paragraph V of the tenth cause of action, defendants allege that they are in possession of and claim rights in and to the properties described therein by reason of the following agreements:

(Said agreements are the same and identical with agreements numbered one through thirteen and referred to and described in the second defense to the ninth cause of action.)

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are in full force and effect and binding upon plaintiff, H. C. Smith, and deny that the claim of defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the tenth cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first

cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Eleventh Cause of Action

As and for their answer to the eleventh cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The eleventh cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I and II of the eleventh cause of action of the amended complaint; answering Paragraph III admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof; in answer to Paragraph IV thereof, defendants allege that the plaintiff W. B. Haney holds by

assignment, the rights of lessee in and to the W $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of Section 13, Township 8 North, Range 59 East of the Montana Principal Meridian to which lease No. Bl. 037591 has been assigned. Allege that said plaintiff W. B. Haney holds a fractional interest, 63/360ths, of Government Leases Nos. Bl. 034165 and 034166 of the lands described in said Paragraph IV under said leases. Defendants deny that Plaintiff W. B. Haney is in possession or entitled to possession of said lands.

Answering Paragraphs V and VI of the eleventh cause of action, defendants allege that they are in possession of and claim rights in and to the property described therein by reason of the following agreements:

1. Fidelity Operating Agreement, dated May 16, 1934, between George Norbeck and Jane M. Norbeck to Fidelity Gas Co., said agreement covering among other lands the same lands referred to in the second paragraph of paragraph IV of the eleventh cause of action and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

2. Fidelity Operating Agreement, dated June 10, 1934, between C. M. Adams, J. H. Adams, and Fidelity Gas Co., said agreement covering among other lands the same lands referred to in the third and fourth paragraphs of paragraph IV of the

eleventh cause of action and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

3. Gas Unit Agreement, dated May 16, 1934, between George Norbeck and Jane M. Norbeck, and Gas Development Company, said agreement covering among other lands the same lands described in the second paragraph of paragraph IV of the eleventh cause of action and with the exception of the names of the contracting parties other than Gas Development Company, description of the properties, percentage figures of participation, and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

4. Gas Unit Agreement, dated January 22, 1935, between C. M. Adams, J. H. Adams and Gas Development Company, said agreement covering among other lands the same lands referred to in the third and fourth paragraphs of paragraph IV of the eleventh cause of action and with the exception of the names of the contracting parties other than the Gas Development Company, description of the properties, percentage figures of participation and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

5. Gas Purchase Agreement, dated May 16, 1934, between George Norbeck, Jane M. Norbeck and Gas Development Company, said agreement covering among other lands the same lands referred

to in the second paragraph of paragraph IV of the eleventh cause of action, and with the exception of the term, name and address of the party of the first part, the date and description of the lands therein contained, and address of "Vendor" where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

6. Gas Purchase Agreement, dated July 10, 1934, between C. M. Adams, J. H. Adams and Gas Development Company, said agreement covering among other lands the same lands referred to in the third and fourth paragraphs of paragraph IV of the eleventh cause of action, and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained, and address of "Vendor" where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

7. Gas Purchase Agreement dated December 19, 1939, between Black Hills Gas & Oil Company, and Montana-Dakota Utilities Co. said agreement covering, except for Lot One (1) of Section Six (6), Township Eight (8) North, Range 59 East, M.P.M., the lands referred to in the third and fourth paragraphs of paragraph IV of the eleventh cause of action, and with the exception of the names and addresses of the parties, the date and description of the lands therein contained, and the address of the "Vendor," where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

8. Operating Agreement, dated April 10, 1951, by and between defendants, Montana-Dakota Utili-

ties Co., Fidelity Gas Co. and Shell Oil Company, a true copy of which is attached hereto and marked Exhibit "D" and hereby made a part hereof.

That defendant, Montana-Dakota Utilities Co., is a successor by merger to the rights of Gas Development Company and the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, W. B. Haney, and deny that the claims of the defendants in and to said premises are without right, title and interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the eleventh cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Twelfth Cause of Action

As and for their answer to the twelfth cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The twelfth cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I and II of the twelfth cause of action of the amended complaint; answering paragraph III admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegation thereof. In answer to Paragraph IV thereof, defendants allege that plaintiff W. B. Haney holds by assignment the rights of lessee in and to the W $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of Section 13, Township 8 North, Range 59 East, M.P.M., to which Lease No. Bl. 034591 has been assigned. Allege that said plaintiff W. B. Haney holds a fractional interest, 63/360ths of Government Leases No. Bl. 034165 and 034166 of the lands described in said Paragraph IV under said leases. Defendants deny that plaintiff W. B. Haney is in possession or entitled to possession of said lands.

Defendants allege that they are in possession of and claim rights in and to the property described

in said Paragraph IV by reason of the following agreements:

(Said agreements are the same and identical with agreements numbered one through eight and referred to and described in the second defense to the eleventh cause of action.)

That defendant, Montana-Dakota Utilities Co., is a successor by merger to the rights of Gas Development Company and the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, W. B. Haney, and deny that the claims of the defendants in and to said premises are without right, title and interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the twelfth cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first

cause of action with the same effect as if repeated at length in this paragraph.

Wherefore, the defendants, Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company, pray that the amended complaint herein be dismissed; that the court find that the agreements referred to in this answer are in full force and effect and that the rights of the plaintiff are subject to the terms and provisions thereof, and that the defendants recover their costs and disbursements herein.

JOHN C. BENSON
ARMIN M. JOHNSON
ARTHUR F. LAMEY

/s/ By ARTHUR F. LAMEY
Attorneys for Defendants.

Of Counsel:

Faegre & Benson
Coleman, Jameson & Lamey

Of Counsel for defendant, Shell Oil Company:
Howard M. Gullickson

[Endorsed]: Filed Sept. 5, 1953.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE REPLY

Come now the plaintiffs in the above action and request leave of Court to file a reply to the answer of the defendants for the reasons following:

The Complaint in this action listed several causes of action seeking to quiet title to certain lands and leases described. By their answer, defendants allege that the complaint fails to state a cause of action as their first defense to each cause of action. For their second affirmative defense to each cause of action, defendants allege that they are entitled to the possession of the lands involved and claim rights to the land by reason of (1) an operating agreement dated February 7, 1935 between the plaintiff and the defendant, Fidelity Gas Company; (2) a certain Cooperative or Unit Plan of Development dated February 7, 1935; (3) certain Gas Purchase Agreements dated May 15, 1929; and (4) an Operating Agreement dated April 10, 1951 between the defendants, Montana-Dakota Utilities Company, Fidelity Gas Company and Shell Oil Company, and that all of the agreements are in full force and effect. The third defense to each cause of action is a plea of estoppel, the fourth defense is a plea of waiver, and the fifth defense is a plea of laches.

It will be the position of the plaintiffs on the trial that the Operating Agreement, Exhibit "A" is no longer effective by reason of abandonment on the part of defendants, Fidelity Gas Company and Montana-Dakota Utilities Company. It will be the position of the plaintiffs that the Unit Plan of Development and the Gas Purchase Agreement does not give to the defendants any right to drill to sands below the Judith River Sands, if the agree-

ment is still in effect, that further it will be the position of the plaintiff that the consideration for the Unit Plan Contract and Gas Purchase Agreement has failed through the fault of the defendant, Montana-Dakota Utilities and that the agreement should be rescinded. Further, plaintiffs say that under the rules, there is doubt that abandonment could be proven without pleading abandonment specifically. Further, it seems clear that proof to support rescision is not admissible without pleading the facts upon which rescision could be based.

Further, plaintiffs believe that the issue cannot be reached without the filing of a reply.

Wherefore, plaintiffs pray for an order of this Court permitting the plaintiffs to file a reply in accordance with what is set out above.

/s/ LEIF ERICKSON

Attorney for the Plaintiffs

[Endorsed]: Filed Oct. 20, 1953.

[Title of District Court and Cause.]

ORDER TO FILE REPLY

Plaintiffs having filed a motion for leave to file a reply to the affirmative defenses in defendants' answer, and good cause appearing,

It Is Ordered, that plaintiffs serve and file a reply to the affirmative defense named in the defendants' answer within twenty (20) days after the date of this order.

Dated this 29th day of October, 1953.

/s/ W. D. MURRAY

Judge

[Endorsed]: Filed Oct. 29, 1953. Entered and noted in Civil Docket October 30, 1953.

[Title of District Court and Cause.]

REPLY

The Court having ordered a reply on motion of the plaintiffs for leave to file a reply to the affirmative matters alleged in defendants' answer, the plaintiffs in reply say:

Answer to First Cause of Action

With reference to the second defense to the first cause of action in the answer of the defendants, plaintiffs say:

I.

That the Operating Agreement, Exhibit "A" to the answer was an option granted by the plaintiffs

to the defendant, Fidelity Gas Company to drill and explore for oil and gas in the deeper sands underlying the property described in the complaint; that prior to December 1, 1937, defendant, Fidelity Gas Company, in pursuance of the option, drilled three wells on the Cedar Creek Anticline, but has drilled no wells since that time; that by the failure of the defendant, Fidelity Gas, or either of them, to drill further exploratory wells within a reasonable time after the completion of the last of the three wells referred to, the Operating Agreement, by its own terms, expired and said Operating Agreement terminated and is of no force or effect;

II.

Plaintiffs further say that if the rights of the defendants were not terminated under the said Operating Agreement, Exhibit "A" to the answer by its own terms as set out above, then the defendant, Fidelity Gas Company abandoned any right which it might have had under the Operating Agreement, Exhibit "A" prior to December 31, 1938, that said abandonment was effected as follows: Subsequent to the execution of the Operating Agreement, Exhibit "A" to the answer, defendant, Fidelity Gas Company drilled three wells on the Cedar Creek Anticline in Fallon County, Montana; the Number 1 Northern Pacific completed prior to October 22, 1936; the Warren Number 1 completed in the late summer of 1937; and the Smith Number 1 well completed prior to May, 1937; that upon the completion of the said three wells, the defendant, Fidel-

ity Gas Company drilled no more wells nor had any other wells drilled under the said Operating Agreement on the said Cedar Creek Anticline or in the vicinity thereof; that after the completion of the said three wells, officers of the defendant companies, Fidelity Gas Company and Montana-Dakota Utilities Company informed officers of the Cedar Creek Oil and Gas Company and the Mondakota Gas Company that they had abandoned any further drilling under the said Operating Agreement and any claim to rights to drill further under said Operating Agreement, and did, by reason of their failure to drill further wells under the said agreement after 1937, their statements and their conduct, abandon any rights any of the said defendants may have had under said Operating Agreement, Exhibit "A"; that therefore, if the Operating Agreement, Exhibit "A" to the answer did not expire and terminate as said in Paragraph I of the reply to the answer to the first cause of action, it terminated by abandonment as set out above and it is of no force or effect;

III.

Plaintiffs further say that if the rights of the defendants were not terminated under the said Operating Agreement, Exhibit "A" to the answer by its own terms or by abandonment as set out above, then the defendants' rights under the said Operating Agreement have been terminated by the failure of the said defendant, Fidelity Gas Company, or either of the defendants, to diligently drill and explore for oil within a reasonable time after the

completion of the three wells referred to above, that it was the duty of the defendant, Fidelity Gas Company to diligently and within a reasonable time, continue the exploration for oil in the deeper sands of the areas described in the said Operating Agreement, that subsequent to the completion of the three wells referred to above during the year 1937, the Fidelity Gas Company, neither itself or by someone else on its behalf, drilled any more oil wells on any of the lands referred to in the said Operating Agreement, and more particularly upon the lands of any of the plaintiffs herein named; that the only consideration for the said Operating Agreement was the exploration and drilling for oil to be performed on the part of the defendant, Fidelity Gas Company; that if the said Operating Agreement, Exhibit "A" to the answer did not expire by its own terms or by abandonment as said in Paragraphs I and II of the reply to the Second Defense of the Answer to the First Cause of Action by the failure of the said Fidelity Gas Company, or any of the defendants, or anyone acting on their behalf to prosecute with reasonable diligence the exploration and drilling for oil after the year 1937, said Operating Agreement, Exhibit "A" to the answer became wholly terminated, null, void and of no effect;

IV.

From prior to January 1, 1938 until after the discovery of oil in the Williston Basin and the making of the contract of April 10, 1951 between the defendants, Montana-Dakota Utilities Com-

pany, Fidelity Gas Company and Shell Oil Company, Exhibit "D" of the answer, the defendants gave no indication by conduct, by written report, by oral report or otherwise to any of these plaintiffs that the defendants, or either of them, claimed any right in any of the lands described in the complaint under the Operating Agreement, Exhibit "A" to the answer; that by reason of the failure of the defendants, or either of them during the periods from prior to January 1, 1938 until about April 10, 1951 to indicate in any manner that they claimed any rights under the said Operating Agreement, plaintiffs relying on the statement and representations and conduct of the defendant, took no affirmative steps to quiet the title of these lands or to take other appropriate steps to cancel, set aside or terminate the said Operating Agreement; that by reason of the discovery of oil in the Williston Basin, these lands have increased tremendously in value for their oil potential; that defendants took no steps to claim an interest in these lands by virtue of the Operating Agreement, Exhibit "A" to the answer until these lands had increased tremendously in value by reason of the discovery of oil in the Williston Basin as above said; and that by reason of the foregoing, defendants are estopped from claiming any right to the lands described in the complaint under the said Operating Agreement, Exhibit "A" to the answer;

V.

With respect to the Cooperative or Unit Plan of

Development, Unit No. 5, Exhibit "B" to the answer and referred to hereafter as the Gas Unit Agreement, plaintiffs say: that the consideration for the said contract has failed by reason of the wrongful conduct of the defendant, Montana-Dakota Utilities Company and that said contract should be cancelled and rescinded by the judgment of this Court for the reasons following: that the defendant, Montana-Dakota Utilities Company operates, and at all times material to this action operated an integrated pipe line system serving cities and towns in the States of Montana, North Dakota and South Dakota; that the said defendant furnishes the only market for gas produced on the lands of the plaintiffs herein described; that under the said Gas Unit Agreement, the said defendant operates all of the gas wells on the lands including those here involved committed to the Unit and determines the amount of gas to be produced from the lands committed to the agreement; that under the said Gas Unit Agreement, Exhibit "B" to the answer, the initial production of gas allocated to Unit 5, the unit in which the lands described in the complaint are located was one billion cubic feet per year; that the said defendant has, during the past five years, arbitrarily, oppressively, wrongfully and without regard to the rights of these plaintiffs, decreased the production of gas from the lands of these plaintiffs to the point where the net returns to the plaintiffs is insignificant; that said defendant, Montana-Dakota Utilities Company has constructed a pipe line from Worland, Wyoming and

entered into long term contracts with the Pure Oil Company, a corporation and others, under which it has agreed to purchase for a period of not less than twenty (20) years, gas to serve its customers formerly served with gas from the Baker-Cedar Creek field and more particularly from the lands of the plaintiffs and others in Unit 5; that in its application to the Federal Power Commission to secure a certificate of convenience and necessity to build the pipe line from Worland, Wyoming to serve its customers in Montana, North Dakota and South Dakota, it represented that it would reduce its production of gas from the Baker-Cedar Creek field of which the lands of the plaintiff are a part, to one billion five hundred thousand m.c.f per year for the next ten years; that the said production of one billion five hundred million m.c.f. per year must be prorated over eight units in said field in addition to Unit No. 5 and to owners of deep wells not committed to any Unit Agreement; that there are ample reserves and facilities installed in the nine units of the Baker-Cedar Creek field, including Unit No. 5 to produce not less than five billion m.c.f. of gas per year; that the purpose of the defendant Montana-Dakota Utilities Company is to maintain a monopoly of gas reserves in the Cedar Creek-Baker field; that its arbitrary, oppressive, wrongful reduction in the amount of gas to be produced on the lands of these plaintiffs is in violation and disregard of the terms and the intent of the Gas Unit Agreement, Exhibit "B" to the answer, and that its arbitrary, oppressive and wrongful

reduction in the amount of gas produced and to be produced in the lands of the plaintiffs described in the complaint has resulted in the substantial failure of the consideration for the Gas Unit Agreement, Exhibit "B" to the answer, and that the said Gas Unit Agreement, Exhibit "B" is of no force or effect;

VI.

Further, with respect to the Cooperative or Unit Plan of Development, Unit No. 5 referred to as the Gas Unit Agreement, Exhibit "B" to the answer, plaintiffs says: that if the said Gas Unit Agreement, Exhibit "B" to the answer is not subject to cancellation and rescission as said above in Paragraph V, then by the terms of the said Gas Unit Agreement, Exhibit "B" to the answer, the rights of these defendants, and more particularly of the defendant, Montana-Dakota Utilities Company, are limited to the right to drill for and produce gas from the Judith River Sands underlying the lands of these plaintiffs and said Gas Unit Agreement gives to these defendants no rights to drill for or produce any hydrocarbons, whether gas, oil or otherwise, in any sands other than the Judith River Sands underlying these lands described in the complaint;

VII.

With respect to the Gas Purchase Agreements, Exhibit "C" to the answer, plaintiffs say: that said Gas Purchase Agreements, Exhibit "C" to the answer were made between the parties as a part of the general plan of operation encompassed in the Gas

Unit Agreement, Exhibit "B" to the answer; that by the terms of the Gas Purchase Contract, Exhibit "C," said Gas Purchase Contracts are in effect a part of the Gas Unit Agreement, Exhibit "B" to the answer; that for the reasons stated in Paragraph VI above, the consideration for the said Gas Purchase Contract, Exhibit "C" has failed and said Gas Purchase Contracts are no longer of any force and effect and said Gas Purchase Contracts ought to be cancelled and rescinded;

VIII.

Further, with respect to the Gas Purchase Agreement, Exhibit "C" to the answer, plaintiff states; that if the said Gas Purchase Agreements are not subject to cancellation and rescision as alleged above in Paragraph VII, said Gas Purchase Agreement, Exhibit "C" to the answer, any rights which defendants may have under said Gas Purchase Agreement, are limited to the Judith Sands.

Answer to Second Cause of Action

With respect to the second defense contained in the answer to the second cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Third Cause of Action

With respect to the second defense contained in the answer to the third cause of action, plaintiffs repeat and re-allege each and every allegation con-

tained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Fourth Cause of Action

With respect to the second defense contained in the answer to the fourth cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Fifth Cause of Action

With respect to the second defense contained in the answer to the fifth cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Sixth Cause of Action

With respect to the second defense contained in the answer to the sixth cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Seventh Cause of Action

With respect to the second defense contained in the answer to the seventh cause of action, plaintiffs repeat and re-allege each and every allegation con-

tained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Eighth Cause of Action

With respect to the second defense contained in the answer to the eighth cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Ninth Cause of Action

With respect to the second defense contained in the answer to the ninth cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Tenth Cause of Action

With respect to the second defense contained in the answer to the tenth cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to the Eleventh Cause of Action

With respect to the second defense contained in the answer to the eleventh cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in

the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Twelfth Cause of Action

With respect to the second defense contained in the answer to the twelfth cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Wherefore, plaintiffs pray:

I.

That the Gas Unit Agreements, Exhibit "B" to the answer of the defendants to each cause of action be cancelled and rescinded and declared to be of no force or effect;

II.

That the Gas Purchase Agreements, Exhibit "C" to the answer of the defendants to each cause of action be cancelled and rescinded and declared to be of no force or effect;

III.

That judgment be entered for each of the plaintiffs against the defendants as asked in the complaint.

Dated this 10th day of November, 1953.

/s/ LEIF ERICKSON

Attorney for Plaintiffs

[Endorsed]: Filed Nov. 10, 1953.

[Title of District Court and Cause.]

ORDER

It Is Ordered and this does order that a pre-trial conference be and the same hereby is set for hearing before the Court at its courtroom in the United States Post Office building, in the city of Butte, Montana, on Tuesday, the 15th day of February, 1955, at the hour of 10:00 o'clock A. M. of said day.

It Is Further Ordered that the Clerk of this Court forthwith notify the attorneys of record for the respective parties of the making of this order.

Done and dated this 6th day of January, 1955.

/s/ W. D. MURRAY

United States District Judge

[Endorsed]: Filed Jan. 6, 1955. Entered and Noted in Civil Docket Jan. 7, 1955.

[Title of District Court and Cause.]

MINUTE ORDER

This cause came on regularly this day for hearing on pre-trial conference, Mr. Leif Erickson and Mr. J. R. Richards being present and appearing for the plaintiffs, and Mr. A. F. Lamey and Mr. Armin M. Johnson being present and appearing for the defendants, Mr. Howard M. Gullickson was present and appeared for the Shell Oil Company.

Thereupon, on motion of Mr. Lamey, Court ordered

that Mr. Charles N. Wagner be entered as associate counsel for defendant Shell Oil Company.

Thereupon, on motion of Mr. Johnson, Court ordered that Mr. Raymond Hildebrand be entered as associate counsel for defendant Montana-Dakota Utilities Company, and that Mr. Rodger L. Nordbye of Minneapolis, Minn, be admitted to practice for the purposes of this case and that his name be entered as associate counsel for the defendant Montana-Dakota Utilities Company.

Thereupon the matters to be considered at the conference were discussed by the Court and counsel, and two certain maps, marked defendants exhibits Nos. 1 and 1-A, and four copies of certain exhibits attached to the answer herein, marked defendants exhibits Nos. 2, 3, 4 and 5, were received in evidence by agreement of counsel.

Thereupon counsel for the plaintiffs were granted until March 15, 1955, within which to serve and file a trial brief herein, and counsel for the defendants were granted until March 29, 1955, within which to serve and file their trial brief, whereupon it was tentatively agreed that the cause be set for trial at Billings. Montana, on April 11, 1955.

Thereupon further hearing herein was continued until 10:00 A. M. tomorrow.

Entered in open Court at Butte, Montana, this 15th day of February, 1955.

H. H. WALKER,
Clerk.

[Title of District Court and Cause.]

MINUTE ORDER

This cause came on regularly this day for further hearing on the pre-trial conference, Mr. Leif Erickson being present and appearing for the plaintiffs, and Messrs. A. F. Lamey, Armin M. Johnson, Raymond Hildebrand and Rodger L. Nordbye being present and appearing for defendants Fidelity Gas Company and Montana-Dakota Utilities Company. Mr. Lamey also appeared for the defendant Shell Oil Company.

Thereupon a pre-trial order, as agreed upon by counsel for the respective parties after a pre-trial conference had on yesterday, was presented to the Court, whereupon said order was signed by the Court and ordered to be filed and entered.

Entered in open Court at Butte, Montana, this 16th day of February, 1955.

H. H. WALKER,
Clerk.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

At 10:00 A. M. on February 15, 1955, pursuant to notice, a pre-trial conference was held in the above action in the courtroom at Butte, Montana, plaintiffs being represented by Leif Erickson and Jerrold Richards, defendants Fidelity Gas Com-

pany and Montana-Dakota Utilities Company being represented by Raymond Hildebrand, Armin M. Johnson, and Rodger L. Nordbye, and defendant Shell Oil Company being represented by Arthur F. Lamey, Howard M. Gullickson and Charles N. Wagner.

After discussion of the pleadings and the issues raised thereby, the following agreements, by way of expediting the eventual trial of the case, were reached:

Amendment of Pleadings

1. Plaintiffs agree to eliminate any question as to the validity of the Gas Unit Agreement (Exhibit B to the answer of defendants) and the Gas Purchase Agreements; that plaintiffs' only contention with respect to such instrument is that they apply only to the Judith River Sand.

In order to effectuate this agreement, plaintiffs' Reply is amended in the following particulars:

- a. Strike all paragraph V on pages 4, 5 and 6.
- b. From paragraph VI strike the first word "further," capitalize "With" line 18 page 6; strike in lines 20, 21 and 22 page 6, the following "if the said Gas Unit Agreement, Exhibit "B" to the answer is not subject to cancellation and rescission as said above in Paragraph V, then".
- c. Strike all of paragraphs VII and VIII and in lieu thereof substitute the following "With respect to the Gas Purchase Agreements, Exhibit "C" to the answer, plaintiff say: that said Gas Purchase Agreements, Exhibit "C" to the answer were made between the parties as a part of the general plan

of operation encompassed in the Gas Unit Agreement, Exhibit "B" to the answer; that by the terms of the Gas Purchase Contract Exhibit "C" said Gas Purchase Contracts are in effect a part of the Gas Unit Agreement Exhibit "B" to the answer and any rights, if any, which defendants may have under said Gas Purchase Agreements are limited to the Judith Sands.

d. Strike from the Prayer on page 10 paragraphs I and II.

2. Plaintiffs withdraw their Prayer against "all other persons unknown" from the Amended Complaint.

Simplification of Issues

Defendants have asked plaintiffs for a clarification of their legal theories involved in paragraphs I and III of plaintiffs' Reply. Defendants have suggested that these two issues can be resolved as a matter of law and that, if this is done, the length of time needed for presentation of defendants' case can be shortened materially. In order to provide clarification and to remove any uncertainties that may exist in the case, the Court has instructed the parties to serve and file briefs setting forth their views as to the issues in the case, the evidence which they propose to offer at the trial, and the applicable law. Plaintiffs will serve and file their brief by March 15, 1955; defendants by March 29, 1955. If the briefs so filed indicate the desirability of further pre-trial procedure, it will take place on April 1, 1955 in Butte, Montana. Tentative setting for trial is April 11, 1955, in Billings, Montana.

Exhibits

With reference to Exhibits, the parties have agreed as follows:

1. The map of the Cedar Creek Anticline, introduced by defendants as Exhibit "1" in the pre-trial conference, may be admitted into evidence at the trial of this cause without further foundation.

2. Exhibits "2" and "3", as introduced by defendants at the pre-trial conference in this cause, are identical with the exhibits designated "A" and "B" attached to defendants' answer.

3. With the exception of the names and addresses of the parties, the date of execution thereof and the lands covered thereby, the instruments described as "Fidelity Operating Agreement" and "Gas Unit Agreement" in defendants' second defense to all causes of action are, for all material purposes, identical with said exhibits "2" and "3."

4. Plaintiffs, or their respective predecessors in interest, executed the "Fidelity Operating Agreement" and "Gas Unit Agreement" described in the second defense of defendants' answer to each cause of action on the dates therein indicated.

5. At the trial of this cause, exhibits "2" and "3" may be introduced into evidence by any party hereto, without objection, other than those as to relevancy and materiality.

6. The operating agreement by and between Montana-Dakota Utilities Co., Fidelity Gas Co. and Shell Oil Company, referred to in defendants' answer as exhibit "D", was executed on or about

April 10, 1951, and, as between the parties thereto, is now in full force and effect.

Evidence of Titles

7. Photostatic copies of instruments relating to title on file in county, state or federal offices shall be admissible in evidence to the same extent as the original instruments.

8. In the case of fee leases, the plaintiffs need not prove title behind the title of the lessor.

Dated this 16th day of February, 1955.

/s/ W. D. MURRAY

United States District Judge

[Endorsed]: Filed Feb. 16, 1955. Entered and Noted in Civil Docket Feb. 17, 1955.

[Title of District Court and Cause.]

NOTICE TO PRODUCE

To: Messrs. Leif Erickson and J. R. Richards
Attorneys at Law
319 Power Block
Helena, Montana

Please take notice that you are required to produce before the Court at the trial of the above entitled action, the following described documents:

1. Letter dated April 27, 1951, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff Cedar Creek Oil & Gas Co. (Exhibit No. 1 to deposition of George H. Seivers taken May 19, 1953).

2. Letter with map attached dated July 23, 1951, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff Cedar Creek Oil & Gas Co. (Exhibit No. 2 to deposition of George H. Seivers taken May 19, 1953).

3. Letter dated October 3, 1952, from R. M. Heskett, President of Defendant Montana-Dakota Utilities Co., to Plaintiff Cedar Creek Oil & Gas Company (Exhibit No. 4 to deposition of George H. Seivers taken May 19, 1953).

4. Letter dated December 23, 1952, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff Cedar Creek Oil & Gas Co. (Exhibit No. 5 to deposition of George H. Seivers taken May 19, 1953).

5. Letter dated September 12, 1952, from John Wight to Mr. George H. Seivers, Secretary-Treasurer of Plaintiff Cedar Creek Oil & Gas Company (Exhibit No. 6 to deposition of George H. Seivers taken May 19, 1953).

6. Unsigned form letter dated September 12, 1952, directed to Defendant Fidelity Gas Company and Defendant Montana-Dakota Utilities Co. (Exhibit No. 7 to deposition of George H. Seivers taken May 19, 1953).

7. Letter dated August 9, 1951, from Defendant Montana-Dakota Utilities Co., to Plaintiff Susan M. Wight (Exhibit No. 2 to deposition of John Wight taken June 11, 1953).

8. Form of notice of cancellation directed to "Montana Dakota Utility" (Exhibit No. 3 to deposition of John Wight taken June 11, 1953).

9. Letter dated September 19, 1953, from Cecil W. Smith, Vice President of Defendant Fidelity Gas Co., to Plaintiff Susan M. Wight (Exhibit No. 5 to deposition of John Wight taken June 11, 1953).

10. Letter dated April 27, 1951, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff W. B. Haney (Exhibit No. 2 to deposition of W. B. Haney taken April 9, 1953).

11. Letter with map attached dated July 23, 1951, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff W. B. Haney (Exhibit No. 3 to deposition of W. B. Haney taken April 9, 1953).

12. Letter dated December 23, 1952, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff W. B. Haney (Exhibit No. 4 to deposition of W. B. Haney taken April 9, 1953).

13. Letter dated August 6, 1952, from John Wight to Plaintiff W. B. Haney (Exhibit No. 6 to deposition of W. B. Haney taken April 9, 1953).

14. Letter dated August 8, 1952, from Plaintiff W. B. Haney to John Wight (Exhibit No. 7 to deposition of W. B. Haney taken April 9, 1953).

15. Letter dated January 21, 1952, from John Wight to Plaintiff W. B. Haney (Exhibit No. 8 to deposition of W. B. Haney taken April 9, 1953).

16. Letter dated April 27, 1951, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff Herman C. Smith

(Exhibit No. 14 to deposition of Herman C. Smith taken April 9, 1953).

17. Letter dated July 23, 1951, with map attached, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff Herman C. Smith (Exhibit No. 15 to deposition of Herman C. Smith taken April 9, 1953).

18. Letter dated December 23, 1952, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff Herman C. Smith (Exhibit No. 16 to deposition of Herman C. Smith taken April 9, 1953).

19. Letter dated August 9, 1951, from Defendant Montana-Dakota Utilities Co., to Plaintiff Herman C. Smith, (Exhibit No. 19 to deposition of Herman C. Smith taken April 9, 1953).

20. Letter dated September 13, 1953, from John Wight to Plaintiff International Trust Company (Exhibit No. 1 to deposition of Robert J. Sullivan taken April 14, 1953).

21. Unsigned letter dated September 12, 1952, from Plaintiff International Trust Company to Defendant Fidelity Gas Company and Defendant Montana-Dakota Utilities Company (Exhibit No. 2 to deposition of Robert J. Sullivan taken April 14, 1953).

22. Letter dated November 17, 1950, from John Wight to Trust Department of Plaintiff International Trust Company (Exhibit No. 3 to deposition of Robert J. Sullivan taken April 14, 1953).

23. Letter dated October 22, 1952, from R. J. Sullivan to John Wight (Exhibit No. 5 to deposition of Robert J. Sullivan taken April 14, 1953).

24. Letter dated December 23, 1952, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff International Trust Company (Exhibit No. 6 to deposition of Robert J. Sullivan taken April 14, 1953).

25. Letter dated July 12, 1951, from John Wight to Plaintiff International Trust Company (Exhibit No. 7 to deposition of Robert J. Sullivan taken April 14, 1953).

26. Unsigned cancellation notice dated July 16, 1951, from Plaintiff International Trust Company to Defendants Fidelity Gas Company and others (Exhibit No. 8 to deposition of Robert J. Sullivan taken April 14, 1953).

27. Letter dated November 1, 1937, to Thos. A. Jirik, Cedar Creek Oil & Gas Co. (Exhibit B to deposition of Cecil W. Smith taken May 19, 1953), from R. M. Heskett.

28. All letters or agreements between John Wight and the plaintiffs, or either of them, or between the plaintiffs, or anyone purporting to represent John Wight, pertaining to the commencement of this action or any other action, involving the gas purchase agreements, unit agreements, or Fidelity operating agreements referred to in the answer of defendants.

29. All letters, documents and agreements pertaining to the transfer of any interest, money or consideration between the plaintiffs or either of them and John Wight on the termination of this litigation.

In default of your production of the above, sec-

ondary evidence of the contents thereof will be offered upon the trial of this action.

Dated this 4th day of April, 1955.

FAEGRE & BENSON

COLEMAN, JAMESON & LAMEY

/s/ By COLE CROWLEY

A member of the Firm.

Attorneys for Defendants

[Endorsed]: Filed April 6, 1955.

[Title of District Court and Cause.]

SUBPOENA DUCES TECUM

To John Wight:

You are hereby commanded to appear in the United States District Court, for the District of Montana, at the Courtroom thereof in the Federal Building, in the City of Billings, Montana, on the 13th day of April, 1955, at 10 o'clock A.M. to testify on behalf of the defendants in the above entitled action and bring with you the following letters and documents:

1. Original decision of L. E. Hoffman, Chief, Division of Minerals, U. S. Department of the Interior, dated March 23, 1953, to Mondakota Gas Company, pertaining to Billings 025001. (Which is referred to in the John Wight deposition as Exhibit 1.)

2. Original letter of Montana-Dakota Util. Co. to Mrs. Susan M. Wight, dated August 9, 1951.

(Which is referred to in the John Wight deposition as Exhibit 2.)

3. Form of notice of cancellation directed to Montana-Dakota Utilities Co. and referred to as Exhibit 3 in the deposition of John Wight.

4. Original letter from Fidelity Gas Company dated Sept. 19, 1952, to Susan M. Wight. (Which is referred to in the John Wight deposition as Exhibit 5.)

5. Original letter dated November 1, 1937, from Cecil W. Smith to John Wight, giving a report on results obtained in drilling N. P. No. 1 Well and Smith's No. 1 Well in Unit No. 8, Cedar Creek Anticline.

6. Written agreement between John Wight and W. B. Haney dated about May 10, 1953, whereby John Wight will receive certain benefits in the event plaintiffs are successful in this action. (See reference at page 11 in John Wight deposition.)

7. Written agreement between John Wight and H. C. Smith whereby John Wight will receive certain benefits in the event plaintiffs are successful in this action. (See reference at page 12 in John Wight deposition.)

8. Written agreement between John Wight and Cedar Creek Oil & Gas Co. whereby John Wight will receive certain benefits in the event plaintiffs are successful in this action. (See reference at page 12 in John Wight deposition.)

9. Copy of the minutes of the Board of Direc-

tors meeting of Mondakota Gas Company held May 23, 1952. (See page 13 John Wight deposition.)

10. Written agreement between Mondakota Gas Company, John Wight (or either of them) and a Mr. Butterfield with reference to financing the conduct of the above entitled action.

11. All letters or agreements between John Wight and the plaintiffs, or either of them, or between the plaintiffs, or anyone purporting to represent John Wight, pertaining to the commencement of this action or any other action, involving the cancellation of the gas purchase agreements, unit agreements, or Fidelity operating agreements referred to in the answer of defendants.

12. All letters, documents and agreements pertaining to the transfer of any interest, money or consideration between the plaintiffs or either of them and John Wight on the termination of this litigation.

Witness, the Honorable W. D. Murray, United States District Judge, this 4th day of April, 1955.

[Seal] /s/ H. H. WALKER,
Clerk

United States of America,
District of Montana

I received this Subpoena Duces Tecum at Billings, Montana, on the 6th day of April, 1955, and on the 6th day of April, 1955, I served it on the within named John Wight by delivering to him a true copy with all endorsements thereon and tender-

ing to him the sum of \$4.00 as his fees for one day's attendance and the mileage allowed by law.

/s/ LOUIS O. ALEKSICH,
U. S. Marshal,
/s/ By J. P. JOHNSON,
Deputy

Marshal fee	\$.50
Travel	\$
Service	\$
Total	\$.50

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

MINUTE ORDER

This cause came on regularly for trial this day, Messrs. Leif Erickson and J. R. Richards being present and appearing for the plaintiffs, Mr. Arthur F. Lamey being present and appearing for all defendants, Messrs. Armin Johnson and Rodger L. Nordbye being present and appearing in behalf of defendants Fidelity Gas Company and Montana-Dakota Utilities Company, and Messrs. Howard M. Gullickson and Charles N. Wagner being present and appearing in behalf of defendant Shell Oil Company.

Thereupon an opening statement was made by Mr. Erickson, whereupon John Wight was sworn as a witness for the plaintiffs.

Thereupon certain exhibits heretofore offered and admitted in evidence at a pre-trial conference

herein, marked defendants exhibits Nos. 1, 1-A, 2, 3 and 5, were re-offered in evidence at this time by counsel for the plaintiffs and admitted without objection. Thereupon a certain exhibit which was offered and admitted in evidence at said pre-trial conference, marked defendants exhibit No. 4, was by agreement of counsel ordered withdrawn from the files, and a new exhibit marked defendants exhibit No. 3 substituted in lieu thereof.

Thereupon, on motion of counsel for the plaintiffs, Court ordered that the third and fourth causes of action contained in the amended complaint, be and are dismissed.

Thereupon a stipulation of facts as to the first and second causes of action contained in the amended complaint, with certain exhibits attached; a stipulation of facts as to the fifth and sixth causes of action contained in the amended complaint, with certain exhibits attached; and a stipulation of facts as to the seventh and eighth causes of action contained in the amended complaint, with certain exhibits attached, were ordered filed herein by agreement of counsel.

Thereupon certain documents, marked plaintiffs exhibits Nos. 6, 7, 8, 9 and 10, were offered and received in evidence without objection.

Thereupon a stipulation of facts as to the ninth and tenth causes of action contained in the amended complaint, with certain exhibits attached; and a stipulation of facts as to the eleventh and twelfth causes of action contained in the amended com-

plaint, with certain exhibits attached, were ordered filed herein by agreement of counsel.

Thereupon John Wight was examined as a witness for the plaintiffs, whereupon a certain letter dated September 28, 1935, to Jirik from Heskett, was marked as plaintiffs exhibit No. 11 for identification, but not offered in evidence at this time. Two certain letters and a certain notice of cancellation, marked respectively as plaintiffs exhibits Nos. 12, 14 and 15, were offered and received in evidence without objection, and a certain letter from Midwest Holding Company, marked plaintiffs exhibit No. 13, was offered in evidence but not admitted on objection by defendants.

Thereupon a certain oral offer of proof was made by counsel for the plaintiffs and taken into the record, whereupon counsel for defendants objected to the offer and the objection was by the Court sustained.

Thereupon, on motion of counsel for defendants, Court ordered that the certain deposition of John Wight in files herein, be opened by the Clerk and filed, whereupon the witness John Wight was interrogated with reference to certain matters contained in said deposition.

Thereupon a certain photostat copy of a letter dated July 12, 1951, marked defendants exhibit No. 16, was offered and received in evidence without objection. Three certain agreements were marked as defendants exhibits Nos. 17, 18 and 19 for identification, but were not offered in evidence at this time. A certain letter dated Sept. 12, 1952, from Wight

to Seivers, marked defendants exhibit No. 20, was offered and received in evidence over the objection of counsel for plaintiffs, and a copy of a certain letter dates Sept. 12, 1952, from Cedar Creek Oil and Gas Company to Fidelity Gas Co., et al., marked defendants exhibit No. 21, was offered and received in evidence without objection.

Thereupon further trial of the cause was ordered continued until 10:00 A. M. tomorrow.

Entered in open Court at Billings, Montana,
April 13, 1955.

H. H. WALKER,
Clerk

[Title of District Court and Cause.]

STIPULATION OF FACTS AS TO FIRST AND SECOND CAUSES OF ACTION

With respect to the first and second causes of action, it is hereby stipulated and agreed by and between plaintiff Cedar Creek Oil and Gas Company and the defendants above named as follows:

Government Leases

1. United States Oil and Gas Lease, Billings 025044-A, dated as of November 26, 1928, was issued to Jacob Edward Warren and C. J. Dousman, as lessees. A true and correct copy of said lease is attached hereto as Exhibit "1".

2. United States Oil and Gas Lease, Billings

025044-B dated as of April 12, 1930, was issued to Jacob Edward Warren and C. J. Dousman, as lessees. A true and correct copy of said lease is attached hereto as Exhibit "2".

3. Said plaintiff's claim to the land covered by leases 025044-A and 025044-B is predicated on an operating agreement dated May 18, 1927, by and between Cedar Creek Oil and Gas Company, as operator, and Jacob Edward Warren, as oil and gas prospecting permittee. A true and correct copy of said operating agreement is attached hereto as Exhibit "3".

4. On June 27, 1927, Jacob Edward Warren assigned an undivided one half interest in permit Billings 025044 to C. J. Dousman. A true and correct copy of said assignment is attached hereto as Exhibit "4".

Fee Leases

Said plaintiff's claim to the lands described in paragraph VI of the first and second cause of action is predicated on:

5. Oil and gas lease dated September 22, 1928, by and between Rush J. Hall and wife, as lessors, and Cedar Creek Oil and Gas Company, as lessee. A true and correct copy of said lease is attached hereto as Exhibit "5".

6. Oil and gas lease dated January 22, 1929, by and between W. A. Goble and wife, as lessors, and Cedar Creek Oil and Gas Company, as lessee. A

true and correct copy of said lease is attached hereto as Exhibit "6".

Dated this 13th day of April, 1955.

/s/ J. R. RICHARDS,

Attorney for plaintiff Cedar Creek
Oil and Gas Company

JOHN C. BENSON,

ARMIN M. JOHNSON,

ARTHUR F. LAMEY,

/s/ By A. F. LAMEY,

Attorneys for Defendants

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

STIPULATION OF FACTS AS TO FIFTH AND SIXTH CAUSES OF ACTION

With respect to the fifth and sixth causes of action, it is hereby stipulated and agreed between plaintiff International Trust Company and the defendants above named as follows:

1. United States Oil and Gas Lease, Billings 029521-A, dated as of November 6, 1935, was issued to Clarence W. Carter. A true and correct copy of said lease is attached hereto as Exhibit "1".

2. United States Oil and Gas Lease, Billings 029521-B, dated as of May 29, 1936, was issued to Clarence W. Carter. A true and correct copy of said lease is attached hereto as Exhibit "2".

3. Said plaintiff's claim to the lands described

in paragraph V of the fifth and sixth causes of action is predicated on assignment of the leases above described executed by Clarence W. Carter, lessee, on August 20, 1942. A true and correct copy of said assignment is attached hereto as Exhibit "3".

Dated this 13th day of April, 1955.

/s/ J. R. RICHARDS,

Attorney for Plaintiff International
Trust Company

JOHN C. BENSON,

ARMIN M. JOHNSON,

ARTHUR F. LAMEY,

/s/ By A. F. LAMEY,

Attorneys for Defendants

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

STIPULATION OF FACTS AS TO SEVENTH AND EIGHTH CAUSES OF ACTION

With respect to the seventh and eighth causes of action, it is hereby stipulated and agreed by and between plaintiff Susan M. Wight and the defendants above named as follows:

1. Said plaintiff for the purpose of this action hereby disclaims any and all interest in and to the S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 12, Township 8 North, Range 59 East.

2. United States Oil and Gas Lease Billings

026954-A, dated as of October 24, 1935, was issued to Mildred Vinsel. A true and correct copy of said lease is attached hereto as Exhibit "1".

3. United States Oil and Gas Lease Billings 026954-B, dated as of June 23, 1936, was issued to Mildred Vinsel. A true and correct copy of said lease is attached hereto as Exhibit "2".

4. On June 18, 1931, the leases described in 4 and 5 above, were committed to the terms of an operating agreement executed by Mildred Vinsel, as prospecting permittee, and George Norbeck, as operator. A true and correct copy of said operating agreement is attached hereto as Exhibit "3".

5. Said plaintiffs claim to the leases described in 2 and 3, above, is predicated on assignment of the operating agreement described in 4, above, dated December 31, 1935, executed by George Norbeck and wife. A true and correct copy of said assignment is attached hereto as Exhibit "4".

Dated this 13th day of April, 1955.

/s/ J. R. RICHARDS,

Attorney for Plaintiff Susan M.
Wight

JOHN O. BENSON,
ARMIN M. JOHNSON,
ARTHUR F. LAMEY,

/s/ By ARTHUR F. LAMEY,
Attorneys for Defendants

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

STIPULATION OF FACTS AS TO NINTH
AND TENTH CAUSES OF ACTION

With respect to the ninth and tenth causes of action, it is hereby stipulated and agreed by and between the plaintiff H. C. Smith and the defendants above named as follows:

1. United States Oil and Gas Lease Billings 029750-A, dated as of October 16, 1935, was issued to W. B. Haney. A true and correct copy of said lease is attached hereto as Exhibit "1".

2. United States Oil and Gas Lease Billings 029750-B, dated as of July 20, 1936, was issued to W. B. Haney. A true and correct copy of said lease is attached hereto as Exhibit "2".

3. Said plaintiff's claim to the leases above described is predicated on two assignments, each dated November 20, 1940, executed by W. B. Haney, lessee. True and correct copies of said assignments are attached hereto as Exhibits "3" and "4".

4. United States Consolidated Oil and Gas Lease Billings 034165-034166, dated as of August 30, 1935, subsequently changed to July 1, 1935, was issued to C. M. Adams. A true and correct copy of said lease is attached hereto as Exhibit "5".

5. On September 19, 1935, C. M. Adams and wife assigned the lease described in 4 above to Black Hills Gas and Oil Company. A true and correct copy of said assignment is attached hereto as Exhibit "6".

6. Said plaintiff's claim to the lease described in

4, above, is predicated on assignment dated October 20, 1941, executed by Black Hills Gas and Oil Company, a corporation. A true and correct copy of said assignment is attached hereto as Exhibit "7".

7. United States Oil and Gas Lease Billings 038253, covering the SE $\frac{1}{4}$ of Section 13, Township 8 North, Range 59 East, has been segregated by assignment from United States Oil and Gas Lease Billings 021056-B, dated as of October 10, 1934, issued to George Norbeck. A true and correct copy of the latter lease is attached hereto as Exhibit "8".

8. On December 10, 1934, George Norbeck and wife assigned the lease covering the land described in 9 above to Harry A. Smith. A true and correct copy of said assignment is attached hereto as Exhibit "9".

9. Said plaintiff's claim to the lease described in 6 above is predicated on assignment dated August 9, 1939, executed by Harry A. Smith and wife. A true and correct copy of said assignment is attached hereto as Exhibit "10".

Dated this 13th day of April, 1955.

/s/ J. R. RICHARDS,

Attorney for Plaintiff H. C. Smith

JOHN C. BENSON,

ARMIN M. JOHNSON,

ARTHUR F. LAMEY,

/s/ By ARTHUR F. LAMEY,

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

STIPULATION OF FACTS AS TO ELEVENTH AND TWELFTH CAUSES OF ACTION

With respect to the eleventh and twelfth causes of action, it is hereby stipulated and agreed by and between plaintiff W. B. Haney and the defendants above named as follows:

1. United States Oil and Gas Lease Billings 037591, covering the SW $\frac{1}{4}$ and W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 13, Township 8 North, Range 59 East, has been segregated by assignment, from United States Oil and Gas Lease Billings 021056-B, dated as of October 10, 1934, issued to George Norbeck. A true and correct copy of the latter lease is attached hereto as Exhibit "1".

2. On December 10, 1934, George Norbeck and wife assigned the lease covering the land described the land in 1 above to Harry A. Smith. A true and correct copy of said assignment is attached hereto as Exhibit "2".

3. Said plaintiff's claim to the lease and lands described above is predicated on assignment dated October 24, 1945, executed by Harry A. Smith and wife. A true and correct copy of said assignment is attached hereto as Exhibit "3".

4. United States Consolidated Oil and Gas Lease Billings 034165-034166, dated as of August 30, 1935, subsequently changed to July 1, 1935, was issued to

C. M. Adams. A true and correct copy of said lease is attached hereto as Exhibit "4".

5. On September 9, 1935, C. M. Adams and wife assigned the lease described in 4 above to Black Hills Gas and Oil Company. A true and correct copy of said assignment is attached hereto as Exhibit "5".

6. On October 20, 1941, Black Hills Gas and Oil Company assigned the lease described in 4 above to Harry A. Smith and others. A true and correct copy of said assignment is attached hereto as Exhibit "6".

7. Said plaintiff's claim to the lease described in 4 above, is predicated on assignment dated October 25, 1945, executed by Harry A. Smith and wife. A true and correct copy of said assignment is attached hereto as Exhibit "7".

Dated this 13th day of April, 1955.

/s/ J. R. RICHARDS,

Attorney for Plaintiff W. B. Haney

JOHN C. BENSON,

ARMIN M. JOHNSON,

ARTHUR F. LAMEY,

/s/ By ARTHUR F. LAMEY,

Attorneys for Defendants

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

MINUTE ORDER

Counsel for respective parties present as before and trial of cause resumed.

Thereupon John Wight was recalled and examined as a witness for the plaintiffs, and three certain agreements heretofore marked for identification as defendants exhibits Nos. 17, 18 and 19, were offered and received in evidence without objection. Thereupon two certain checks, marked respectively as plaintiffs exhibits Nos. 22 and 23, were offered and received in evidence without objection. Thereupon counsel for the plaintiffs made a certain oral offer of proof, which was taken into the record, whereupon counsel for the defendants objected to the offer for reasons stated, and the objection was by the Court sustained.

Thereupon W. B. Haney was sworn and examined as a witness for the plaintiffs, and photostat copies of two certain agreements, marked respectively as plaintiffs exhibits Nos. 24 and 25, were offered and received in evidence without objection. Thereupon photostat copies of three certain letters, marked respectively as plaintiffs exhibits Nos. 26, 27 and 28, were received in evidence by stipulation of counsel.

Thereupon H. C. Smith was sworn and examined as a witness for the plaintiffs, and photostat copies of a certain agreement, of a certain cancelation notice, and of a certain letter, marked respectively as plaintiffs exhibits Nos. 29, 30 and 31, were offered

and received in evidence without objection. A certain photostat copy of a letter dated April 18, 1952, from H. C. Smith to Montana-Dakota Utilities Company, marked plaintiffs exhibit No. 32, was offered and received in evidence over the objection of counsel for the defendants.

Thereupon Thomas A. Jirik was sworn and examined as a witness for the plaintiffs, and a certain letter dated Sept. 28, 1935, to Thos. A. Jirik from R. M. Heskett, heretofore marked as plaintiffs' exhibit No. 11 for identification, was offered and received in evidence without objection. Three certain letters addressed to Thos. A. Jirik, one from Cecil W. Smith and two from R. M. Heskett, marked respectively as plaintiffs' exhibits Nos. 33, 34 and 35, were offered and received in evidence without objection. Thereupon a bundle of gas statements covering credits to account of Cedar Creek Oil and Gas Company from Montana-Dakota Utilities Company for the year 1949, marked plaintiffs' exhibit No. 36, was offered and received in evidence over the objection of counsel for the defendants.

Thereupon a certain deposition of Thomas A. Jirik was presented by counsel for the defendants, and by stipulation of counsel for all parties, said deposition was received in evidence and ordered filed, whereupon the witness Jirik was interrogated as to certain matters contained therein. A certain letter dated Sept. 29, 1952, to Fidelity Gas Company, et al., from Cedar Creek Oil and Gas Company, marked plaintiffs' exhibit No. 37, was offered and received in evidence without objection.

Thereupon George H. Seivers was sworn and examined as a witness for the plaintiffs, and a certain letter dated Jan. 25, 1952, to Cedar Creek Oil and Gas Company and signed by Cecil W. Smith, and a copy of a certain geological report dated Oct. 23, 1951, and signed by Harry A. Schroth, marked respectively as plaintiffs' exhibits Nos. 38 and 39, were offered and received in evidence over the objection of counsel for defendants. Thereupon, on motion of counsel for the defendants, the deposition of George H. Seivers, in the files of the case, was ordered to be opened and filed, whereupon the witness Seivers was interrogated as to certain matters contained therein.

Thereupon plaintiffs rested.

Thereupon Court ordered that further trial of this cause be continued until 10:00 a.m. tomorrow.

Entered in open Court at Billings, Montana, April 14, 1955.

H. H. WALKER,
Clerk

[Title of District Court and Cause.]

MINUTE ORDER

Counsel for respective parties present as before and trial of cause resumed.

Thereupon an opening statement as to defendants' case was made by Mr. Armin M. Johnson.

Thereupon Frank W. DeWolf was sworn and examined as a witness for the defendants, and a

certain map, marked defendants' exhibit No. 40, was offered and received in evidence without objection.

Thereupon Herman F. Davies was sworn and examined as a witness for the defendants, and two certain letters, marked respectively as defendants' exhibits Nos. 41 and 42, were offered and received in evidence without objection.

Thereupon Cecil W. Smith was sworn and examined as a witness for the defendants, whereupon, during the examination of said witness, counsel for defendants made a certain oral offer of proof which was taken into the record, to which offer counsel for plaintiffs objected and the objection was by the Court sustained. Thereupon certain documents, marked defendants' exhibits Nos. 43, 44, 45, 46, 47 and 48, and plaintiffs' exhibit No. 49, were offered and received in evidence without objection.

Thereupon further trial of the cause was ordered continued until 10:00 a.m. tomorrow.

Entered in open Court at Billings, Montana,
April 15, 1955.

H. H. WALKER,
Clerk

[Title of District Court and Cause.]

MINUTE ORDER

Counsel for respective parties present as before and trial of cause resumed.

Thereupon Cecil W. Smith was recalled and examined as a witness for the defendants, and four

certain letters, marked as plaintiffs' exhibits Nos. 50, 51, 52 and 53, were offered and received in evidence without objection.

Thereupon, on motion of Mr. Lamey, and by agreement of counsel for the plaintiffs, Court ordered that the witness Smith be withdrawn at this time in order to allow defendants to call another witness who desires to leave by plane for his home in Minneapolis, Minnesota.

Thereupon R. M. Heskett was sworn and examined as a witness for the defendants.

Thereupon Cecil W. Smith was recalled and further examined as a witness for the defendants, and a bundle consisting of 20 letters, marked as plaintiffs' exhibit No. 54, was offered and received in evidence over the objection of counsel for the defendants. Two photostat copies of certain assignments and one photostat copy of a certain decision approving assignment, marked respectively as defendants' exhibits Nos. 55, 56 and 57, were offered in evidence, to which offers counsel for the plaintiffs objected. Thereupon Court announced that it will reserve ruling on the admission of said exhibits in evidence. Thereupon two certain letter-agreements, marked as defendants' exhibits Nos. 58 and 59, were offered and received in evidence over the objection of counsel for the plaintiffs.

Thereupon Winston Cox and T. R. Barnes were sworn and examined as witnesses for the defendants, whereupon, during the examination of the witness Barnes, counsel for the defendants made three certain oral offers of proof, which offers were

stated and taken into the record. Thereupon counsel for the plaintiffs objected to each offer of proof as made, and the objection as made to each offer was by the Court sustained.

Thereupon E. G. Christiansen was sworn and examined as a witness for the defendants, and a certain tabulation of Shell Oil Company, chronological order of development to March 31, 1955, Cedar Creek Anticline, marked as defendants' exhibit No. 60, was offered and received in evidence without objection.

Thereupon the defendants rested.

Thereupon John Wight was recalled and examined as a witness in rebuttal, and a certain letter dated Feb. 15, 1938, to John Wight from Alger R. Syme, marked as plaintiffs' exhibit No. 61, was offered and received in evidence without objection.

Thereupon Thomas A. Jirik was recalled and examined as a witness in rebuttal, whereupon the plaintiffs rested and the evidence was closed.

Thereupon Court ordered that after receipt of a transcript from the Court Reporter, the plaintiffs be granted 45 days within which to serve and file a brief and submit proposed findings of fact and conclusions of law; that the defendants be granted 30 days, after receipt of plaintiffs' brief, within which to serve and file their brief and submit proposed findings of fact and conclusions of law; and that the plaintiffs be granted 15 days, after receipt of defendants' brief, within which to serve and file

a reply brief if so advised, whereupon the cause will be submitted and by the Court taken under advisement.

Entered in open Court at Billings, Montana,
April 16, 1955.

H. H. WALKER,
Clerk

[Title of District Court and Cause.]

PLAINTIFFS' PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

The above cause came on regularly for trial before the Honorable W. D. Murray, United States District Judge for the District of Montana, sitting without a jury at Billings, Montana, on April 13, 1955. The plaintiffs were represented by their counsel, Messrs. Leif Erickson and J. R. Richards, of Helena, Montana. All of the defendants were represented by their counsel, Mr. A. F. Lamey of Billings, Montana. The defendants, Fidelity Gas Company and Montana-Dakota Utilities Company were represented by their counsel, Messrs. Armin M. Johnson and Rodger L. Nordbye of Minneapolis, Minnesota, and the defendant, Shell Oil Company was represented by its counsel, Messrs. Charles N. Wagner and Howard N. Gullickson of Denver, Colorado. During the trial of the cause upon motion of the plaintiffs, causes of action three and four were dismissed. Evidence both oral and documentary was received by the Court in support of

the pleadings of the parties. The parties having rested, the case was submitted to the Court and taken under advisement. Counsel was given time in which to submit requested Findings of Fact and Conclusions of Law and to submit briefs in support thereof.

Now, therefore, after a consideration of all the evidence, and the Court being fully advised in the premises, the Court now makes the following,

Findings of Fact

That on November 26, 1928, United States Oil and Gas Lease Billings 025044-A was issued to Jacob Edward Warren and C. J. Dousman as lessee; that on April 12, 1930, United States Oil and Gas Lease Billings 025044-B was issued to Jacob Edward Warren and C. J. Dousman as lessees. That on May 18, 1927, plaintiff Cedar Creek Oil and Gas Company, a corporation, entered into an Operating Agreement with Jacob Edward Warren covering the lands covered by said United States Oil and Gas Leases No. 025044-A and 025044-B, said Operating Agreement having been entered into prior to the issuance of the said leases and the said Operating Agreement having been made prior to June 27, 1927 when the said Jacob Edward Warren assigned an undivided one-half interest in United States Oil and Gas Permit Billings 025044 upon which the said two leases are based. That the lands covered by said United States Oil and Gas Leases are:

The Southeast Quarter (SE $\frac{1}{4}$), the South Half

of the Northeast Quarter of the Southwest Quarter ($S\frac{1}{2}NE\frac{1}{4}SW\frac{1}{4}$), South Half of the Southwest Quarter ($S\frac{1}{2}SW\frac{1}{4}$) of Section 23, the Northeast Quarter ($NE\frac{1}{4}$) of Section 35, the North Half ($N\frac{1}{2}$), the Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}SW\frac{1}{4}$) North Half of the Northeast Quarter of the Southwest Quarter ($N\frac{1}{2}NE\frac{1}{4}SW\frac{1}{4}$) of Section 23, the North Half ($N\frac{1}{2}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section 24, the North Half of the Northwest Quarter ($N\frac{1}{2}NW\frac{1}{4}$), the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}NW\frac{1}{4}$), the North Half of the Southeast Quarter ($N\frac{1}{2}SE\frac{1}{4}$), the Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}SE\frac{1}{4}$) of Section 25, the Northeast Quarter of the Northwest Quarter ($NENW\frac{1}{4}$) of Section 35, all in Township 8 North, Range 59 East of the Montana Principal Meridian.

That the said leases and the said Operating Agreement are still in effect and have not been cancelled or forfeited, and have not been sold, assigned or otherwise disposed of by the plaintiff, Cedar Creek Oil and Gas Company.

II.

That on September 22, 1928, an oil and gas lease was executed by and between Rush J. Hall and wife, as lessors and plaintiff, Cedar Creek Oil and Gas Company as lessee, covering:

Lots Three (3) and Four (4), the South Half of the Northwest Quarter ($S\frac{1}{2}NW\frac{1}{4}$), the Southwest Quarter ($SW\frac{1}{4}$) of Section Two

(2), all in Township 8 North, Range 59 East Montana Principal Meridian.

That the said lease is still in effect and has not been cancelled or forfeited, and has not been sold, assigned or otherwise disposed of by the plaintiff, Cedar Creek Oil and Gas Company.

III.

That on January 22, 1929, W. A. Goble and wife, as lessors, executed and delivered to plaintiff, Cedar Creek Oil and Gas Company, as lessee, an oil and gas lease covering:

The West Half ($W\frac{1}{2}$) of Section Twelve (12), Township 8 North, Range 59 East, Montana Principal Meridian.

That the said lease is still in effect and has not been cancelled or forfeited, and has not been sold, assigned or otherwise disposed of by the plaintiff, Cedar Creek Oil and Gas Company.

IV.

That on November 6, 1935, United States Oil and Gas Lease Billings 029521-A was issued to Clarence W. Carter. That on May 29, 1936, United States Oil and Gas Lease Billings 029521-B was issued to Clarence W. Carter. That on August 20, 1942, the said Clarence W. Carter and wife, as lessees, assigned said leases to the plaintiff, International Trust Company. That the lands covered by said leases are described as follows:

The South Half ($S\frac{1}{2}$) of Section Five (5) and Northeast Quarter ($NE\frac{1}{4}$), the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$

NW $\frac{1}{4}$), the Northeast Quarter of the Southeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 27, all in Township 8 North of Range 59 East, Montana Principal Meridian.

That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff, International Trust Company.

V.

That on October 24, 1935, United States Oil and Gas Lease Billings 026954-A was issued to Mildred Vinsel. That on June 23, 1936, United States Oil and Gas Lease Billings 026954-B was issued to Mildred Vinsel. That on June 18, 1931, the oil and gas prospecting permit upon which the said lease was based was committed to the terms of an Operating Agreement executed by Mildred Vinsel as prospecting permittee and George Norbeck as operator. That on December 31, 1935, said Operating Agreement was assigned by George Norbeck and wife to plaintiff, Susan M. Wight. That the lands covered by said leases are:

Lots One (1), Two (2), Three (3) and Four (4) and the East Half of the Northwest Quarter (E $\frac{1}{2}$ NW $\frac{1}{4}$) and the East Half of the Southwest Quarter (E $\frac{1}{2}$ SW $\frac{1}{4}$) of Section 30, Twn. 8 North, Range 60 East, M.P.M.

That the said leases and the said Operating Agreement are still in effect and have not been cancelled or forfeited, and have not been sold, assigned or otherwise disposed of by the plaintiff, Susan M. Wight.

VI.

That on the 10th day of October, 1934, United States Oil and Gas Lease Billings 021056-B was issued to George Norbeck. That among the lands covered by said United States Oil and Gas Lease are:

The Southeast Quarter ($SE\frac{1}{4}$) of Section 12, and the North Half of the North Half ($N\frac{1}{2}N\frac{1}{2}$) of Section 10, all in Township 8 North, Range 59 East.

That on December 31, 1935, George Norbeck and wife assigned to the plaintiff, Susan M. Wight their interest in said lease to:

The Southeast Quarter ($SE\frac{1}{4}$) of Section 12, Township 8 North, Range 59 East Montana Principal Meridian.

That on September 1, 1936, George Norbeck and wife assigned to plaintiff, Susan M. Wight, their interest under said lease to:

The North Half of the North Half ($N\frac{1}{2}N\frac{1}{2}$) of Section 10, Township 8 North, Range 59 East Montana Principal Meridian.

That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff, Susan M. Wight.

VII.

That on the 3rd day of June, 1931, W. A. Beck and Susie Beck, his wife, as lessors, executed an oil and gas lease to Norbeck Company, a corporation, as lessees, covering:

The East Half ($E\frac{1}{2}$) of Section 18, Township

8 North, Range 60 East Montana Principal Meridian.

That on December 31, 1935, said Norbeck Company assigned its interest in said lease as to:

The Southeast Quarter (SE $\frac{1}{4}$) of Section 18, Township 8 North, Range 60 East Montana Principal Meridian

to the plaintiff, Susan M. Wight.

That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff Susan M. Wight.

VIII.

That on October 16, 1935, United States Oil and Gas Lease Billings 029750-A was issued to W. B. Haney. That on July 20, 1936, United States Oil and Gas Lease Billings 029750-B was issued to W. B. Haney. That on November 20, 1940, W. B. Haney assigned his interest in said lease to plaintiff, H. C. Smith. That the lands covered by said leases and assignments are:

Lots One (1), Two (2), Three (3) and Four (4), the South Half of the North Half (S $\frac{1}{2}$ N $\frac{1}{2}$) of Section 4, Township 8 North, Range 59 East Montana Principal Meridian.

That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff, H. C. Smith.

IX.

That on July 1, 1935, United States Consolidated Oil and Gas Lease, Billings 034165-034166 was is-

sued to C. M. Adams. That the lease covered, among other lands:

The Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section 8, and Lot One (1), and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section 6, and Lots One (1) and Two (2) and the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section 2, all in Township 8 North of Range 59 East Montana Principal Meridian.

That the said C. M. Adams and wife, on September 19, 1935, assigned their interest in the said leases as to the lands above described to the Black Hills Gas and Oil Company, a corporation. That on October 20, 1941, the Black Hills Gas and Oil Company, a corporation, assigned a $\frac{213}{360}$ ths interest in said leases, insofar as they cover the lands herein described, to the plaintiff, H. C. Smith.

That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff, H. C. Smith.

X.

That on October 10, 1934, United States Oil and Gas Lease Billings 021056-B was issued to George Norbeck. United States Oil and Gas Lease Billings 038253 covering:

The Southeast Quarter ($SE\frac{1}{4}$) of Section 13, Township 8 North, Range 59 East Montana Principal Meridian

has been segregated by assignment from said United States Oil and Gas Lease Billings 021056-B. That on December 10, 1934, George Norbeck and wife assigned the said lease to Harry A. Smith. That on August 9, 1939, Harry A. Smith and wife assigned their interest in said lease to the plaintiff, H. C. Smith. That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff, H. C. Smith.

XI.

That on October 10, 1934, United States Oil and Gas Lease Billings 021056-B was issued to George Norbeck. That United States Oil and Gas Lease Billings 037591 covering:

The Southwest Quarter (SW $\frac{1}{4}$) and the West Half of the Northwest Quarter (W $\frac{1}{2}$ NW $\frac{1}{4}$) of Section 13, Township 8 North, Range 59 East Montana Principal Meridian,

has been segregated by assignment from said United States Oil and Gas Lease Billings 021056-B. That on December 10, 1934, George Norbeck and wife assigned said United States Oil and Gas Lease to Harry A. Smith. That on October 24, 1945, Harry A. Smith and wife assigned their interest in said lease to the plaintiff, W. B. Haney. That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff, W. B. Haney.

XII.

That on July 1, 1935, United States Consolidated

Oil and Gas Lease Billings 034165-034166 was issued to C. M. Adams. That the said leases covered:

The Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section 8, Lot One (1) and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section 6, Lots One (1) and Two (2), the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section 2, all in Township 8 North of Range 59 East Montana Principal Meridian.

That on September 19, 1935, C. M. Adams and wife assigned said lease to the Black Hills Gas and Oil Company, a corporation. That on October 20, 1941, the Black Hills Gas and Oil Company, a corporation, assigned to Dr. Harry A. Smith an undivided 63/360ths interest in said lease and that on October 24, 1945, Harry A. Smith and wife assigned their interest in said lease to the plaintiff, W. B. Haney. That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff, W. B. Haney.

XIII.

That during the year 1935, all of the plaintiffs, or their predecessors in title entered into a certain agreement designated as an Operating Agreement with the defendant, Fidelity Gas Company, a corporation, a wholly owned subsidiary of the defendant, Montana-Dakota Utilities Company, a corporation, covering the lands set forth hereinbefore. That

except as to the dates, the description of the lands and the signatures covered by each agreement, the said agreements were identical. That the Operating Agreement covered only the sands and horizons below the 2000 foot zone. That under the terms of the said agreement, Fidelity Gas Company undertook and agreed to drill a test well on the lands involved in this litigation or on other designated lands within a period of one year and the plaintiffs, or their predecessors by said agreement, granted to the defendant, Fidelity Gas Company, an option to prosecute further drilling of wells under the agreement after the conclusion of the test well to be drilled within the one year period.

XIV.

That the defendant, Fidelity Gas Company, proceeding under the terms of the said Operating Agreement, drilled three test wells, one of the said test wells, designated as the Warren Well, being drilled upon lands involved in this litigation. That the said test well was completed and abandoned in January of 1937. That the said well was not a commercial producer and it was plugged at the time of its completion and abandonment. That the cost of drilling the said test well was paid by the defendant, Fidelity Gas Company out of money furnished to it by defendant, Montana-Dakota Utilities Company. That no further wells were drilled by the Fidelity Gas Company or the Montana-Dakota Utilities Company, or by any person or corporation acting on its behalf in the area of gas

units number 5, 6 and 7 of the Cedar Creek Anticline in Fallon County, Montana, the lands involved in this litigation being located in Units 4 and 5 of said Anticline and neither defendant, Fidelity Gas Company or defendant, Montana-Dakota Utilities Company expended any funds from January, 1937 to date, in seismic exploration, test drilling or development of the sands below the 2000 foot horizon on the lands here involved or on any lands in Unit 5 from the month of January, 1937 to date. That said Operating Agreement was terminated by the failure of the defendants, Fidelity Gas Company and Montana-Dakota Utilities Company to exercise said option.

XV.

That during the years 1937 and 1938, at various times, officers of the defendant corporations, Fidelity Gas Company and Montana-Dakota Utilities Company made oral statements to agents and officers of some of the plaintiffs that the said defendant corporations had abandoned their drilling program under the said Operating Agreement and that the said corporations, or either of them, would drill no further test wells on the lands of the plaintiffs under the said Operating Agreement and that at no time from January 1937 until April 21, 1951, did the defendants, Fidelity Gas Company and Montana-Dakota Utilities Company indicate to these plaintiffs or their predecessors that the said defendant corporations claimed any interest in the lands involved in this litigation under said Operating Agreement and the plaintiffs understood and

believed that by the failure of the defendants, Fidelity Gas Company and Montana-Dakota Utilities Company to drill further test wells, coupled with the said statements of the officers of the said corporations, that the said defendants had elected not to exercise the option to drill further test wells and to keep the said agreement alive. That upon the trial defendants offered no explanation for their delay in the period from January of 1937 until April 21, 1951 in asserting any claim of right or interest in the lands here involved by reason of said Operating Agreement, and the lapse of time in asserting said claim was unreasonable, and reasonable diligence was not exercised on the part of the defendants Fidelity Gas Company and Montana-Dakota Utilities Company in asserting said claim.

XVI.

That by reason of the failure of the defendants, Fidelity Gas Company or Montana-Dakota Utilities Company during the period from January of 1937 to April 21, 1951 to assert any claim or right under the said Operating Agreement, the plaintiffs, or their predecessors did not take any legal action to secure judicial determination that the said Operating Agreement was ineffective and that had the defendants, or either of them, during the period from January, 1937 to 1951 indicated in any manner that they claimed interest in the lands involved, plaintiffs or their predecessors would have long since filed an action to quiet title or some other appropriate action to secure judicial determination

that the said agreement was no longer in effect and the said defendants are now estopped to claim any interest under said Operating Agreement.

XVII.

That by reason of the failure of the defendants, Fidelity Gas Company or Montana-Dakota Utilities Company, or anyone acting on their behalf to drill any further test wells as provided in the Operating Agreement, the said defendants abandoned the purpose of said agreement.

XVIII.

That at approximately the same time that the Operating Agreements above referred to were executed, plaintiffs, or their predecessors entered into agreements unitizing the Judith River Sands in the lands here involved under which Unit Agreements defendant Montana-Dakota Utilities Company was designated as the Operator for the purpose of the production of natural gas from the Judith River Sands and a further agreement under which the plaintiffs or their predecessors agreed to sell the gas so produced from the Judith River Sands to the defendant, Montana-Dakota Utilities Company.

XIX.

That said Gas Unit Agreement was expressly limited by the terms of the said agreement to the Judith River Sands in the lands here involved and that the said agreement specifically provided that the said Gas Unit Agreement should create no interest or title on behalf of the defendant, Montana-Dakota Utilities Company in the lands of the plain-

tiffs and that while provision was made in said Gas Unit Agreement for the commitment of other sands here involved to similar gas Unit Agreements under conditions therein specified, none of the other sands have been committed to said agreements and it is implied in the said Gas Unit Agreement that the authority of the Montana-Dakota Utilities Company to commit any other sands to similar agreements be limited to a reasonable time. That the said Gas Unit Agreements were made in the years 1934 and 1935 and due to the lapse of time, said provision is no longer effective and the defendant, Montana-Dakota Utilities Company has no authority under the said Gas Unit Agreements to commit sands other than the Judith River Sands in the lands here involved to Unit Agreements.

XX.

That the Gas Purchase Agreements are simply agreements under which Montana-Dakota Utilities Company agrees to purchase gas produced on the lands of these plaintiffs and vests in the defendants, Montana-Dakota Utilities Company and Fidelity Gas Company no interest in the lands here involved.

XXI.

That on April 10, 1951, Montana-Dakota Utilities Company, Fidelity Gas Company and Shell Oil Company entered into an Operating Agreement under which the Shell Oil Company agreed to drill for and develop oil in the sands below 2000 feet on the lands of these plaintiffs and upon other lands.

That this Operating Agreement was neither signed nor approved by any of the plaintiffs in this action.

From the foregoing Findings of Fact, the Court makes its:

Conclusions of Law

I.

That the plaintiffs hold their respective interests on their respective lands as set forth in the Findings of Fact, free and clear of all of the claims of the defendants except for any rights held by the Montana-Dakota Utilities Company under the various Gas Unit Agreements and Gas Purchase Agreements insofar as the said agreements apply to the Judith River Sands in the lands here involved and with the exception of such rights under such agreements, none of said defendants has any right, title or interest in or to said lands, or any part thereof.

II.

That the plaintiffs are entitled to a decree as prayed for in their Complaint to quiet their title to said lands and leases against said defendants and each of them, with the exception of any claims the Montana-Dakota Utilities Company may have under said Gas Unit Agreements or said Gas Purchase Agreements to the Judith River Sands in said lands.

III.

That the plaintiffs are entitled to a judgment for

costs. And the judgment is hereby ordered to be entered accordingly.

Dated this....day of....., 1955.

.....

Judge

[Endorsed]: Lodged August 17, 1955.

[Title of District Court and Cause.]

DEFENDANTS' PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

[Defendants' Proposed Findings of Fact and Conclusions of Law are the same as those set out at pages 182-201 except for the deletion of paragraphs XIV, XV, XXII, XXIV and addition of new copy.]

[Endorsed]: Lodged September 16, 1955.

[Title of District Court and Cause.]

MEMORANDUM

The plaintiffs commenced this action to quiet title of the plaintiffs in and to certain lands and leases situated in Fallon County, State of Montana, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon. The action was removed to the United States District Court on the grounds of diversity of citizenship. Originally the amended

complaint contained twelve causes of action, but prior to the time of trial the third and fourth causes of action, involving the plaintiff Mondakota Gas Company, were dismissed.

Each of the remaining plaintiffs alleges two causes of action and in one the claim of the defendants, which constitutes the alleged cloud sought to be removed, is based upon a so-called lease and operating agreement, hereinafter referred to as the Fidelity Agreement. The other cause of action for each plaintiff alleges that the claim of the defendants, which constitutes the alleged cloud sought to be removed, is based upon certain unit plan of development agreements, hereinafter referred to as the Gas Unit Agreements. The complaint in each of the remaining causes of action further alleges that the plaintiffs are the owners, in the possession of, and entitled to the possession of the lands or leases described, but that the defendants and each of them claim some right in and to said lands and leases by virtue of said Fidelity Agreement and said Gas Unit Agreements above referred to. It is further alleged that the claims of the defendants are invalid and without any right whatsoever and a decree is sought quieting title to the plaintiffs in their respective lands and leases.

The defendants answered the amended complaint jointly. The first defense in the answer is that the complaint fails to state a claim upon which relief can be granted.

In the second defense in the answer the defendants deny that plaintiffs were in possession of the

lands and leases and allege that defendants are in possession under certain agreements which it is alleged are in full force and effect. The agreements under which defendants claim to be in possession of the land are, first, the said Fidelity Agreements referred to be in the plaintiffs' complaint; second, the Gas Unit Agreements referred to in plaintiffs' complaint; third, certain Gas Purchase Agreements and the operating agreement between the defendants Montana-Dakota Utilities Company, Fidelity Gas Company and Shell Oil Company. The third defense in the answer is that of estoppel, the fourth waiver, and the fifth laches.

Plaintiffs, after obtaining leave of court, filed a reply in which the validity of the agreements set forth in the answer is denied. As to the said Fidelity Agreements, it is alleged, first, said agreements expired by their terms by reason of the failure of Fidelity Gas Company to drill further exploratory wells within a reasonable time; second, if they did not so terminate, defendant Fidelity Gas Company abandoned its right under the said agreements; third, if the agreements did not terminate by their own terms and if they were not abandoned, the Fidelity Gas Company's rights terminated because it was the duty of the defendant to diligently and within a reasonable time continue exploration for oil in the deeper sands, that the only consideration for the agreement was the exploration and drilling for oil by Fidelity Gas Company; and fourth, that defendants are estopped to claim under the Fidelity Agreements. The reply also alleged certain grounds

upon which the said Gas Unit Agreements and Gas Purchase Agreements were invalid, but the validity of these agreements was removed as an issue in the case at a pre-trial conference when it was stipulated between the parties that all questions as to validity of these agreements were eliminated and plaintiffs' contention with respect to these agreements was limited to the claim that they only apply to the stratum known as the Judith River sands.

Trial was had, and the first issue to be resolved is whether or not the said Fidelity Agreements are still in full force and effect.

The lands here involved are situated upon a geological formation known as the Cedar Creek Anticline. The Cedar Creek Anticline comprises a great number of acres of land and much of it has been blocked into units for purposes of oil and gas exploration and production. The lands and leases of the plaintiffs herein are located in what is known as Unit 5. This unitization of lands on the Cedar Creek Anticline was accomplished by a series of agreements between the owners of land and the holders of private and government leases and permits on the land on the one hand, and Fidelity Gas Company and Gas Development Company on the other. The type of agreement with which are are concerned is the so-called Fidelity Agreement. All of the plaintiffs or their predecessors in interest subjected their lands or leases to this so-called operating agreement. While the lands or leases of each of the plaintiffs is subject to a different oper-

ating agreement, bearing different dates, the agreements are all the same except for the date, the parties and the description of the lands covered. In each case, Fidelity Gas Company is the second party.

One of the points of contention between the parties is whether the so-called Fidelity Agreements are, strictly speaking, merely operating agreements, or whether they are in fact subleases.

What parties label an instrument does not control in determining what the instrument actually is; if in fact they make a sublease, they do not change it by calling it an operating agreement. After first naming the parties, and describing the land, the so-called operating agreements provide:

“Now, therefore, for and in consideration of Ten Dollars (\$10.00) to it paid, and other valuable considerations, receipt whereof is hereby acknowledged by it, said first party does hereby devise and sub-lease and sub-let unto said second party all of the rights, interests and estate owned by the first party in and under the leases, permits and agreements upon all of the lands hereinabove described, with the exclusive right of possession and right to said second party to fully enjoy and use all of the rights, benefits, and privileges, belonging to the said first party, in and under said lease, permits and/or agreements, subject, however, to the covenants, conditions, terms and agreements hereinafter provided.”

This language, used by the parties, indicates their intention to make a sublease, and the Court can

find nothing in other provisions of the agreement that would require the Court to defeat the intention of the parties so expressed by construing the instrument as something other than a sublease. A sublease is a grant by a tenant of an interest in the demised premises less than his own, retaining to himself a reversion. A subletting creates a new estate, dependent upon, or carved out of, but distinct from, the original leasehold. 32 Am. Jur., Sec. 392 & 393, p. 331. All of the terms and provisions of the Fidelity Agreements taken as a whole fit these definitions of a sublease found in American Jurisprudence.

Defendants, in support of their position that the Fidelity Agreements are not subleases rely upon the Montana cases of *Aronow vs. Hill, et al.*, 87 Mont. 153, 286 Pac. 140; and *Cedar Creek Oil & Gas Co. vs. Archer*, 112. Mont. 477, 117 Pac. (2d) 265. In each of those cases it appears that the instrument with which the Court was concerned did not purport to sublease the land, as does the Fidelity Agreements here, in the language above quoted. In the *Archer* case all of the reasons which the Montana Court gave for holding the agreement there under consideration to be a drilling contract would be equally present in the case of a sublease, and the real reason for the Court's holding in that case was that the parties had not expressed an intention to make a sublease, but on the contrary clearly expressed their intention to enter into a drilling contract.

It seems clear to the Court that the Fidelity

Agreements here involved are subleases and must be considered as such. This view is strengthened by the fact that in the agreement between the defendants of April 10, 1951, by which Shell Oil Company obtained its rights in the lands in question, the defendant Fidelity Gas Company subleased and demised to Shell the rights to the lands in question under the Fidelity Agreements. If the Fidelity Agreements were merely operating agreements or drilling contracts as defendants contend, Fidelity would have no interest to sublease to Shell.

Did the Fidelity Agreements Expire by Their Own Terms

The first ground upon which plaintiffs assert the present invalidity of the Fidelity Agreements is that the agreements expired by their own terms. Plaintiffs say the agreements required Fidelity Gas Company to drill an additional test well within, at most, 18 months after the unsuccessful completion of the first test wells, and having failed to do so, the agreements expired. Defendants' position is that even if the agreements requiring the drilling of an additional test well within the 18-months period asserted by plaintiffs, which they deny, it would still have been necessary for the plaintiffs, in order for the contract to be terminated, to serve notice of forfeiture, and that no such notice of forfeiture ever having been served, the agreements are still in full force and effect.

The Fidelity Agreements are long, consisting of nine closely printed pages, and it would serve no

purpose to reproduce the entire agreement in this memorandum. The provisions of the agreement necessary to decide this feature of the case are as follows:

“2. * * * * * Provided, however, upon the surrender, cancellation, forfeiture, or other termination of the rights of second party hereunder as to all or any of the said lands; second party shall have the right to retain the exclusive possession of, and to operate, deepen, redrill, and produce any and all oil wells then drilling or being produced by it upon such lands, and as to which second party shall not be in default hereunder, with the appurtenances thereto, and the forty acre government sub-division upon which each such well is located, subject, however, to the terms of this agreement. Second party at its option may drill additional wells upon lands so retained by it. Forfeiture of all of the rights of second party as to respective lands upon which it shall be in default in the performance of the drilling, operating or producing obligations under this agreement and its failure to proceed to remedy such default within thirty (30) days after receipt of written notice from first party thereof, shall be the exclusive remedy of first party against second party on account of any such default hereunder; and default in drilling of the test well as hereinafter provided shall be deemed default as to all of the lands subject thereto.* * * * *

“3. Second party hereby agrees that as soon as practicable after the execution of this agreement and delivery by first party to second party of sat-

isfactory evidences of merchantable title to first party's lands, it will conduct a geological examination of the Cedar Creek anticline, wherein said lands are located, for the purpose of determining a location deemed favorable for drilling a well to test said structure for oil and/or gas. Said well may be located upon said lands, or upon any other lands located upon said structure. Second party will commence drilling operations for drilling such well within one year from the date of execution of operating agreements by the owners or lessees of lands within that area of the Cedar Creek anticline, located south of the north line of Section Thirty-six (36), Township Six (6) North, Range Sixty (60) East, now or formerly owned or controlled by Gas Development Company, Miller & Kennedy, D. J. Carter, Monarch Gas Corporation, or Messrs. Rehnke, McDonald and Vandervort, and George Norbeck and Norbeck Co. Said test well shall be drilled to a depth of sixty-five hundred feet, unless oil of commercial quality and quantity shall be discovered at a lesser depth, but below two thousand feet, or unless the Madison Lime Formation shall be encountered at a lesser depth. If such test well shall result in the discovery of natural gas of commercial quality and quantity at a lesser depth than 6,500 feet or above the Madison Lime Formation, such well may be completed as a gas well, at second party's option, and in that event a new test well for oil shall be drilled as soon thereafter as practicable. If said well shall be drilled into the Madison Lime Formation for a

distance of one hundred feet without encountering commercial production, or if mechanical difficulties are encountered, which make further drilling impossible, or if formations are encountered which indicate to geologists of second party that further drilling would be futile, said well may be abandoned.

“4. After completion or abandonment of said test well, second party shall have the right, at its option, to prosecute such further drilling of wells under like terms and conditions, and at such times as shall be deemed by it to be good oil field practice, having due regard that the drilling operations hereunder are purely exploratory and speculative, and also having due regard to weather and road conditions. In the event that under customary oil field practice in prospecting a wild cat area, second party shall be unable to commence the drilling of a new test well before September first of any year, the commencement of any such well may be deferred, at the option of second party, until the following first day of April.

“5. In the event that oil of commercial quality and in paying quantities is first discovered on the Cedar Creek anticline, but on lands not subject to this agreement, and located outside the area outlined in black upon the map attached hereto as Exhibit “A”, second party agrees that it will within one year after the completion of such first commercial oil well commence the drilling of a second test well at such location as will be determined upon by geologists for the second party, on some part of the

lands on said Cedar Creek anticline, located within the area of proposed Units Two (2), Three (3), Four (4) or Five (5), which well shall have for its objective the same horizon as shall have been found to be productive in the first test well. Such well shall be drilled to a depth of 6,500 feet unless oil of commercial quality and quantity or the Madison Lime Formation is encountered at a lesser depth. Second party agrees that if the said second test well is completed as a commercial well, it will prosecute in accordance with good oil field practice the further drilling of wells in the vicinity of said paying well, or wells, heretofore drilled on that part of the Cedar Creek anticline within the area outlined in black upon the map attached hereto as Exhibit "A", for the purpose of progressively extending the producing limits thereof, toward and upon the lands subject to this agreement."

It is the interpretation of Paragraph 4, above quoted, upon which the principal dispute between the parties rests. At the trial the plaintiffs sought to introduce oral testimony as to the meaning of this paragraph upon the grounds that the same was ambiguous and required an explanation. Objection to such testimony upon the ground that it would violate the parol evidence rule was sustained by the Court, but plaintiffs were granted leave to further argue the matter in written briefs, with the understanding that if the Court's opinion were changed as a result of such briefs the case would be reopened for the reception of such evidence.

Extensive arguments were submitted in plaintiffs' briefs in support of the admissibility of such evidence, but the Court remains of the opinion that Paragraph 4 is not ambiguous, needs no explanation by way of oral evidence and that such evidence was properly excluded.

The meaning of Paragraph 4 is clear when read in the light of the provisions of the contract as a whole.

By the terms of Paragraph 3, Fidelity was obligated to commence drilling a test well within one year after the execution of certain operating agreements therein specified. The depth and formation to which the well was to be drilled and the contingencies upon which it would be permissible to abandon the well were set out in detail. In the event such test well encountered commercial production, then the provisions of Paragraph 5 came into play, and Fidelity was obligation to commence drilling another well within one year after the completion of the first commercial well, and so on as in Paragraph 5 provided. Under Paragraphs 3 and 5 Fidelity Gas Company assumed definite, binding obligations as to drilling, and it is to these obligations that the forfeiture provisions of Paragraph 2 apply.

However, the situation with regard to Paragraph 4 is different. Under that paragraph, in the event that the test well proved uncommercial, Fidelity had no further binding obligation to do additional drilling, but did have the right, at its option, to drill further wells under like terms and conditions

as specified in Paragraph 3 concerning the first test well, and at such times as would be good oil field practice in a wildcat area. The phrase "under like terms and conditions", refers not to time of drilling, but to depth, formation and the conditions provided in Paragraph 3 with regard to a test well. In short, Paragraph 4 granted to Fidelity Gas Company the option to conduct further drilling operations, in the event the first test well was unsuccessful, and further provided that the option so granted must be exercised within the time after the completion of the unsuccessful test well that good oil field practice in a wild cat area would require.

This holding that Paragraph 4 granted to Fidelity an option to do further drilling within the time required by good oil field practice in a wild cat area is not founded upon the theory expressed in *Thomas vs. Standard Development Co.*, 70 Mont. 156, 224 Pac. 870, and similar cases, that all oil and gas leases are merely options; nor, in the Court's opinion, is its holding weakened by the decision in *Homestake Exploration Co. vs. Schar-egge*, 81 Mont. 604, 264 Pac. 388, that the contract there under consideration was one of lease, and not of option. The decision here reached is based upon the language which the parties here used and failed to use in the instrument, together with the reasonable inferences to be drawn therefrom.

No authority is required for the proposition that an instrument can create both a lease and an option, and that is what has been done by the so-called

Fidelity operating agreements. The plaintiffs leased, or more accurately, subleased, their lands to Fidelity Gas Company for the purpose of drilling for oil and gas upon the condition that the first test well be commenced within one year after the execution of certain agreements. In the event the first well, or any subsequent well drilled under the agreements, was a producer, Fidelity was bound to drill additional wells, at not to exceed yearly intervals, under the terms of Paragraph 5. However, in the event the first test well, or any subsequent well drilled under the agreements, was not a commercial producer, no further obligation remained for Fidelity to perform in the way of drilling; and unless Paragraph 4 be construed to be an option, Fidelity could sit back, do nothing, and forever retain the land under the agreement, because no term is otherwise provided. The forfeiture clause in Paragraph 2 would have no application to this situation, because the clause provides for notice of forfeiture only in case of default in drilling, operating or producing obligations, and as stated before, there was no obligation on Fidelity to drill, if the test well was unsuccessful. It is not reasonable to believe plaintiffs would accede to any such arrangement, and only by holding that Paragraph 4 granted an option can a reasonable result be arrived at.

Having reached the conclusion that by the terms of Paragraph 4, Fidelity Gas Company had an option to conduct further drilling on the Cedar Creek anticline, the question remains as to whether they exercised such option within the time allowed. The

evidence shows between the time of the execution of said agreements and the year 1938, three wells were drilled under said agreements by Fidelity Gas Company. In the Court's view the first of these wells constituted a compliance with the obligation imposed by Paragraph 3, while the other two were drilled under the option granted in Paragraph 4, and that the time within which additional drilling could be done under Paragraph 4 commenced to run upon cessation of the last work done on the three original wells, which, the evidence shows was July or August, 1938, when pumping tests were ended on the so-called Smith well. The evidence further shows no further drilling was done under said agreements until the Carter Oil Company well was commenced under an arrangement with Fidelity on May 12, 1941, which was plugged on January 8, 1942. From then there was no more drilling under the said agreements until a well drilled by Husky under an arrangement with Fidelity was commenced on May 13, 1949, and completed as a non-producing well some short time after July 29, 1949. The next drilling thereafter was the successful well by Shell Oil Company which was commenced on July 8, 1951, and following that successful well, Shell had drilled some 53 wells to the date of trial, all under the agreement of April 10, 1951, between Montana Dakota Utilities, Fidelity and Shell.

The time between the last work on the Smith well in July or August, 1938, and the commence-

ment of drilling the Carter well on May 12, 1941, seems to the Court to be a rather long time without any drilling being done, as does the time from January 8, 1942, when the Carter well was plugged, to May 13, 1949, when the Husky well was completed, although during part of the latter interval World War II was in progress, which would, under the terms of the contract, excuse drilling for at least a portion of the time. However, as has been stated, the time within which the option granted in Paragraph 4 was required to be exercised was within the time dictated by good oil field practice in a wild cat area. The record in the case is barren of evidence concerning good oil field practice in a wild cat area, and the Court is unable to determine whether there was a timely exercise of the option or not. Therefore, it will be necessary to reopen the case for the taking of further evidence upon this question unless decision of some of the other questions presented will dispose of the case.

Defendants have argued that negotiations which the evidence shows Fidelity carried on with California Company in 1939 or 1940 for drilling on the anticline, and its negotiations with Carter in 1940 and 1941, which culminated in the drilling of the Carter well, were sufficient to keep the operating agreements in effect. With this position the Court cannot agree, because it is apparent in this case, as in almost all similar situations, that it was drilling, not negotiations, in which the plaintiffs were interested.

Abandonment of Agreement by Fidelity

Plaintiffs' next point is that if the Fidelity Agreements did not terminate by their own terms, they were abandoned by Fidelity. As has been previously noted, it will be necessary to take further evidence as to what constitutes good oil field practice in a wild cat area as regards the time of drilling wells before it can be determined whether the agreements terminated by their own terms. However, if such evidence establishes that the agreements did not terminate, the claim of abandonment is not sustained by the evidence in this case. As recognized by both sides in their briefs, there is great confusion in the law regarding abandonment of oil and gas leases because of the failure of courts to distinguish between forfeiture and abandonment, and their tendency to use the words "abandonment" and "forfeiture" inexactly and interchangeably. However, from a review of the decisions on abandonment, it is clear that intent to abandon must be shown before abandonment can be found. In this case while there is contradicted evidence that statements were made by officials of defendants Fidelity Gas Company and Montana-Dakota Utilities Company to the effect that those companies were through with deep drilling on the Cedar Creek anticline, such evidence was unconvincing. Furthermore, there is uncontradicted evidence that all during the time when the abandonment is alleged to have taken place, Fidelity Gas Company was negotiating with various companies for the development of the anticline. These negotiations, established not

only by the testimony of officials of defendant Fidelity Gas Company, but also by testimony of disinterested employees of the concerns with whom the negotiations were had, completely negates any intent on the part of Fidelity Gas Company to abandon their agreements.

Estoppel

Because of the complexity of this case, and the great amount of work counsel have devoted to it, as evidenced by the voluminous briefs submitted, the Court, in the foregoing portion of this memorandum, has endeavored to discuss and rule upon all of the points raised. The Court feels, however, that the issues raised by defendants' defenses of estoppel, waiver and laches are decisive of the case, because whether the Fidelity Agreements had expired by their own terms, or were abandoned, the evidence shows that plaintiffs are estopped to claim the termination or abandonment of the agreements as against these defendants.

The evidence shows the defendants Montana-Dakota Utilities Company and Fidelity Gas Company transferred all of their interests in the lands in question which they held under the Fidelity Agreements and Gas Units Agreements to Shell Oil Company by an agreement dated April 10, 1951. By a letter dated April 27, 1951, from Montana-Dakota Utilities Company, the plaintiffs were advised of this agreement, and were further advised that Shell Oil Company was to proceed with drilling operations within 90 days. The plaintiffs all

agree that this letter conveyed to them the idea that Fidelity Gas Company was still claiming an interest in their lands, leases or licenses under the Fidelity Agreements. The plaintiffs Smith and Haney, and the witness Jirik, President and General Manager of Cedar Creek Oil and Gas Company, admit receiving the letter in the ordinary course of mail. The witness Wight, however, claims on behalf of plaintiffs Susan Wight and International Trust Co. that he did not see the letter of April 27, 1951, until a year after its date. However, there is no claim made that the letter was not sent to International Trust Company or Susan Wight or that they were not delivered in the ordinary course of the mail to those plaintiffs.

Despite this knowledge that Fidelity claimed rights under the Fidelity Agreements, and had subleased those rights to Shell Oil Company, and that Shell Oil Company, in reliance upon such sublease was about to undertake expensive drilling operations, these plaintiffs sat idly by and permitted Shell to proceed, until the filing of this action on February 2, 1953, by which time, due to the success of the Shell operations, the lands and leases in question had increased tremendously in value. So far as the evidence shows, none of the plaintiffs ever notified or made any claim to any of the defendants that the Fidelity Agreements had expired. The plaintiff H. C. Smith did on July 16, 1951, send by registered mail a "Notice of Cancellation" to Fidelity Gas Company, Gas Development Company and Montana-Dakota Utilities Company in

which he advised them that he "does hereby declare forfeited and cancelled any unit or option" claimed by those companies under the old operating agreements. No grounds for the forfeiture or cancellation is specified, and it would therefore, under Paragraph 2 of the Fidelity Agreements be ineffective as a notice of default. Furthermore, the very attempt to forfeit or cancel suggests that in H. C. Smith's mind, the agreement had not terminated, and only adds to the estoppel. Too, the date of this letter was about eight days after Shell had commenced drilling its first well under the agreement of April 10, 1951.

There is some additional evidence of a notice or letter of cancellation sent to Fidelity Gas Company by Cedar Creek Oil and Gas Company on September 29, 1952. However, this was well over a year after Cedar Creek, through Mr. Jirik, had learned of the Shell agreement, and by the time of that letter a number of successful wells had been completed by Shell and the lands and leases of the plaintiffs had been greatly enhanced in value.

It is also worthy of note that although plaintiffs knew that it was Shell Oil Company that was to expend its money for drilling in reliance on the validity of the Fidelity Agreements, there is no evidence that any attempt was made to notify Shell of their claims of the invalidity of the Fidelity Agreements.

Under all of the circumstances it must be held that plaintiffs are estopped to assert the termination or abandonment of the Fidelity Agreements.

As stated in 19 Am. Jur., Section 86, page 741, "the owner of a known right or title may by his representations, acts, or silence so lead another to act in the belief that the owner has waived, surrendered, or abandoned his right or title that he will be estopped from asserting it to the injury of him who has changed his position in reliance upon the owner's representations, acts, or silence." Certainly, by this silence, after knowledge of the Shell agreement, the plaintiffs have placed themselves in just this position.

It has also been suggested that under Paragraph 2 of the Agreements that defendants have kept the leases, licenses and permits of plaintiffs in force and effect by performing the obligations of the plaintiffs under those leases, licenses and permits, and that this would be another ground of estoppel. The only obligation of the plaintiffs under their various leases, licenses and permits, was the payment of various royalties and rentals, and the evidence shows that while defendants Montana-Dakota Utilities Company and Fidelity Gas Company did make payments and keep the leases, licenses and permits in effect, these payments were made under the gas unit agreements and not the operating agreements, and in fact were paid out of the plaintiffs' share of gas production from the lands involved.

In view of the disposition of the case, no discussion with reference to the admissibility of the opinion of the witness Barnes, as an expert witness, without evidence of the facts upon which

he based his opinion being in the case, is required, except to say a review of the authorities cited leaves the Court of the opinion that the evidence was properly excluded.

Dated at Butte, Montana, this 12th day of June, 1956.

/s/ W. D. MURRAY,
United States District Judge

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause came on regularly for trial before the Honorable W. D. Murray, United States District Judge for the District of Montana, sitting without a jury at Billings, Montana, on April 13, 1955. Plaintiffs were represented by their counsel, Messrs. Leif Erickson and J. R. Richards, of Helena, Montana. All of the defendants were represented by their counsel, Mr. Arthur F. Lamey, of Billings, Montana. Defendants Fidelity Gas Co. and Montana-Dakota Utilities Co. were represented by their counsel, Messrs. Armin M. Johnson and Rodger L. Nordbye, of Minneapolis, Minnesota, and Raymond Hildebrand, of Glendive, Montana. Defendant Shell Oil Company was represented by its counsel, Messrs. Howard M. Gullickson and Charles N. Wagner, of Denver, Colorado. On motion of counsel for plaintiffs the third and fourth

causes of action of plaintiffs' amended complaint were dismissed. Oral and documentary evidence was received in support of the pleadings of the parties. The parties having rested, the case was submitted to the Court and taken under advisement. Counsel were granted time in which to submit requested findings of fact and conclusions of law and to submit briefs in support thereof.

Now, therefore, after consideration of all the evidence, and the Court being fully advised in the premises, the Court now makes the following,

Findings of Fact

I.

United States Oil and Gas Prospecting Permit Billings 025044 was issued to Jacob Edward Warren on May 31, 1924. Said permit covered the following described lands situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Twenty-three (23): All; Section Twenty-four (24): North Half ($N\frac{1}{2}$), Southeast Quarter ($SE\frac{1}{4}$); Section Twenty-five (25): North Half Northwest Quarter ($N\frac{1}{2}NW\frac{1}{4}$), Southeast Quarter Northwest Quarter ($SE\frac{1}{4}NW\frac{1}{4}$), North Half Southeast Quarter ($N\frac{1}{2}SE\frac{1}{4}$), Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}SE\frac{1}{4}$); Section Thirty-five (35): Northeast Quarter ($NE\frac{1}{4}$), Northeast Quarter Northwest Quarter ($NE\frac{1}{4}NW\frac{1}{4}$), North Half Southeast Quarter ($N\frac{1}{2}$

SE $\frac{1}{4}$), Southeast Quarter Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$).

On May 18, 1927, the said Jacob Edward Warren entered into an operating agreement with plaintiff Cedar Creek Oil and Gas Company, covering his interest in said permit and any resulting leases covering the above-described landed. On June 27, 1927, the said Jacob Edward Warren assigned an undivided one-half ($\frac{1}{2}$) interest in and to said permit to C. J. Dousman, subject to the terms and conditions of said operating agreement. United States Oil and Gas Leases Billings 025044-A and 025044-B, covering the lands above described, dated as of November 26, 1928, and April 12, 1930, respectively, were issued to Jacob Edward Warren and C. J. Dousman, lessees. The interest thus acquired by plaintiff Cedar Creek Oil and Gas Company is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

II.

On September 22, 1928, Rush J. Hall and Ethel Hall, as lessors, and plaintiff Cedar Creek Oil and Gas Company, as lessee, executed an oil and gas lease covering the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Two (2): Lots Three (3), Four (4), South Half Northwest Quarter (S $\frac{1}{2}$ NW $\frac{1}{4}$), Southwest Quarter (SW $\frac{1}{4}$).

The interest thus acquired by plaintiff Cedar

Creek Oil and Gas Company is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

III.

On January 22, 1929, W. A. Goble and Fannie B. Goble, as lessors, and plaintiff Cedar Creek Oil and Gas Company, as lessee, executed an oil and gas lease covering the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Twelve (12): West Half ($W\frac{1}{2}$).

The interest thus acquired by plaintiff Cedar Creek Oil and Gas Company is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

IV.

United States Oil and Gas Leases Billings 029521-A and Billings 029521-B, dated as of November 6, 1935, and May 29, 1936, respectively, were issued to Clarence W. Carter, Lessee, and cover the following described lands situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Five (5): Southeast Quarter ($SE\frac{1}{4}$), Southwest Quarter ($SW\frac{1}{4}$); Section Twenty-seven (27): Northeast Quarter ($NE\frac{1}{4}$), Northeast Quarter Northwest Quarter ($NE\frac{1}{4}NW\frac{1}{4}$), Northeast Quarter Southeast Quarter ($NE\frac{1}{4}SE\frac{1}{4}$).

On August 20, 1942, the said Clarence W. Carter assigned said leases to plaintiff International Trust Company. The interest thus acquired by plaintiff International Trust Company is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

V.

United States Oil and Gas Leases Billings 026954-A and Billings 026954-B, dated as of October 24, 1935, and June 23, 1936, respectively, were issued to Mildred Vinsel, lessee, and cover the following described lands situated in Fallon County, Montana:

Township Eight (8) North, Range Sixty (60) East, M.P.M.; Section Thirty (30): Lots One (1), Two (2), Three (3), Four (4), East Half Northwest Quarter ($E\frac{1}{2}NW\frac{1}{4}$), East Half Southwest Quarter ($E\frac{1}{2}SW\frac{1}{4}$).

Prior to issuance of said leases, the said Mildred Vinsel, as prospecting permittee, and George Norbeck, as operator, entered into an operating agreement, dated June 18, 1931, covering the lands above described. On December 31, 1935, the said George Norbeck assigned all of his right, title and interest in and to said operating agreement to plaintiff Susan M. Wight. The interest thus acquired by plaintiff Susan M. Wight is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

VI.

United States Oil and Gas Lease Billings

021056-B, dated as of October 10, 1934, was issued to George Norbeck and covers, among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Ten (10): North Half North Half ($N\frac{1}{2}N\frac{1}{2}$); Section Twelve (12): Southeast Quarter ($SE\frac{1}{4}$).

By means of assignments dated December 31, 1935, and September 1, 1936, George Norbeck conveyed all of his right, title and interest in and to the lands above described to Susan M. Wight. The interest thus acquired by said plaintiff, with respect to oil and gas in formations below two thousand (2,000) feet, consists of, and is limited to, an undivided one-half ($\frac{1}{2}$), in that the said Norbeck had previously conveyed an undivided one-half ($\frac{1}{2}$) interest to Atlantic Pacific Oil Company of Montana by means of assignment dated October 1, 1934. Such interest of plaintiff Susan M. Wight is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

VII.

On June 3, 1931, W. A. Beck and Susie Beck, as lessors, and Norbeck Company, a corporation, as lessee, executed a lease for the sole purpose of mining and producing natural gas from, among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Sixty

On August 20, 1942, the said Clarence W. Carter assigned said leases to plaintiff International Trust Company. The interest thus acquired by plaintiff International Trust Company is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

V.

United States Oil and Gas Leases Billings 026954-A and Billings 026954-B, dated as of October 24, 1935, and June 23, 1936, respectively, were issued to Mildred Vinsel, lessee, and cover the following described lands situated in Fallon County, Montana:

Township Eight (8) North, Range Sixty (60) East, M.P.M.; Section Thirty (30): Lots One (1), Two (2), Three (3), Four (4), East Half Northwest Quarter ($E\frac{1}{2}NW\frac{1}{4}$), East Half Southwest Quarter ($E\frac{1}{2}SW\frac{1}{4}$).

Prior to issuance of said leases, the said Mildred Vinsel, as prospecting permittee, and George Norbeck, as operator, entered into an operating agreement, dated June 18, 1931, covering the lands above described. On December 31, 1935, the said George Norbeck assigned all of his right, title and interest in and to said operating agreement to plaintiff Susan M. Wight. The interest thus acquired by plaintiff Susan M. Wight is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

VI.

United States Oil and Gas Lease Billings

021056-B, dated as of October 10, 1934, was issued to George Norbeck and covers, among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Ten (10): North Half North Half ($N\frac{1}{2}N\frac{1}{2}$); Section Twelve (12): Southeast Quarter ($SE\frac{1}{4}$).

By means of assignments dated December 31, 1935, and September 1, 1936, George Norbeck conveyed all of his right, title and interest in and to the lands above described to Susan M. Wight. The interest thus acquired by said plaintiff, with respect to oil and gas in formations below two thousand (2,000) feet, consists of, and is limited to, an undivided one-half ($\frac{1}{2}$), in that the said Norbeck had previously conveyed an undivided one-half ($\frac{1}{2}$) interest to Atlantic Pacific Oil Company of Montana by means of assignment dated October 1, 1934. Such interest of plaintiff Susan M. Wight is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

VII.

On June 3, 1931, W. A. Beck and Susie Beck, as lessors, and Norbeck Company, a corporation, as lessee, executed a lease for the sole purpose of mining and producing natural gas from, among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Sixty

(60) East, M.P.M.; Section Eighteen (18): Southeast Quarter (SE $\frac{1}{4}$).

By means of assignment dated December 31, 1935, the said Norbeck Company conveyed its interest in said lease, as the same pertains to the land above described, to plaintiff Susan M. Wight. The interest thus acquired by plaintiff Susan M. Wight is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

VIII.

United States Oil and Gas Leases Billings 029750-A and Billings 029750-B, dated as of October 16, 1935, and July 20, 1936, respectively, were issued to W. B. Haney, lessee, and cover the following described lands situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Four (4): Lots One (1), Two (2), Three (3), Four (4), South Half North Half (S $\frac{1}{2}$ N $\frac{1}{2}$).

By means of assignment dated November 20, 1940, said W. B. Haney conveyed all of his interest in and to said leases to plaintiff H. C. Smith. The interest thus acquired by plaintiff H. C. Smith is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

IX.

United States Consolidated Oil and Gas Lease Billings 034165-034166, dated as of July 1, 1935, was issued to C. M. Adams, lessee, and covers,

among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Two (2): Lots One (1), Two (2), South Half Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$), Southeast Quarter ($SE\frac{1}{4}$); Section Six (6): Lot One (1), Southeast Quarter Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$); Section Eight (8): Northwest Quarter Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$).

On September 19, 1935, the said C. M. Adams assigned the lease above described to Black Hills Oil and Gas Company, a corporation. By means of assignment dated October 20, 1941, Black Hills Oil and Gas Company assigned an undivided $\frac{213}{360}$ interest in and to said lease, insofar as the same pertains to the land above described, to plaintiff H. C. Smith. The interest thus acquired by plaintiff H. C. Smith is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

X.

United States Oil and Gas Lease Billings 021056-B, dated as of October 10, 1934, was issued to George Norbeck, lessee, and covers, among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Thirteen (13): Southeast Quarter ($SE\frac{1}{4}$).

By means of assignment dated December 10, 1934,

the said Norbeck conveyed all of his interest in and to said lease, as the same pertains to the property above described, to Harry A. Smith. Such assigned portion has been designated United States Oil and Gas Lease Billings 038253 and was acquired by plaintiff H. C. Smith by means of assignment executed by the said Harry A. Smith on August 9, 1939. The interest thus acquired by plaintiff H. C. Smith is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

XI.

United States Oil and Gas Lease Billings 021056-B, dated as of October 10, 1934, was issued to George Norbeck, lessee, and covers, among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Thirteen (13): Southwest Quarter (SW $\frac{1}{4}$), West Half Northwest Quarter (W $\frac{1}{2}$ NW $\frac{1}{4}$).

By means of assignment dated December 10, 1934, the said Norbeck conveyed all of his interest in and to said lease, as the same pertains to the property above described, to Harry A. Smith. Such assigned portion has been designated United States Oil and Gas Lease Billings 037591 and was acquired by plaintiff W. B. Haney by means of assignment executed by the said Harry A. Smith on October 24, 1945. The interest thus acquired by plaintiff W. B. Haney is in full force and effect and has not been

cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

XII.

United States Consolidated Oil and Gas Lease Billings 034165-034166, dated as of July 1, 1935, was issued to C. M. Adams, lessee, and covers, among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Two (2): Lots One (1), Two (2), South Half Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$), Southeast Quarter ($SE\frac{1}{4}$); Section Six (6): Lot One (1), Southeast Quarter Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$); Section Eight (8): Northwest Quarter Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$).

On September 19, 1935, the said C. M. Adams assigned the lease above described to Black Hills Oil and Gas Company, a corporation. By means of assignment dated October 20, 1941, Black Hills Oil and Gas Company assigned an undivided 63/360 interest in and to said lease, insofar as the same pertains to the land above described, to Harry A. Smith. The interest of Harry A. Smith was acquired by plaintiff W. B. Haney by means of assignment dated October 24, 1945. The interest thus acquired by plaintiff W. B. Haney is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

XIII.

The lands hereinabove described are located on a geologic structure known as the Cedar Creek Anticline. During 1934 and 1935, all of the plaintiffs, or their predecessors in title, together with approximately 90% of the owners or oil and gas working or operating interests in lands located on the Anticline, entered into an agreement with defendant Fidelity Gas Company which has been referred to in defendants' answer, and will be referred to herein, as "Fidelity Operating Agreement." Such agreements were executed on a printed form, designated "247," and, except as to the dates, descriptions of lands and parties involved, are identical. The agreements grant and sublease to defendant Fidelity Gas Company, as operator, oil and gas working rights of plaintiffs, in the lands hereinabove described, for the purpose of conducting a cooperative exploratory and development program on the entire Cedar Creek Anticline, as a structural entity, in horizons below two thousand (2,000) feet.

XIV.

Under the terms of said Fidelity Operating Agreements Fidelity Gas Company was bound to commence drilling of a test well somewhere on the Anticline within one year after the execution of certain operating agreements. In the event said test well failed to encounter commercial production, Fidelity Gas Company, under said Fidelity Operating Agreements had the option to drill additional test wells within the time required by good

oil field practice in a wildcat area. There is no evidence in the record as to what constitutes good oil field practice in a wildcat area as regards the time between the completion of an unsuccessful well and the commencement of a new well. In the event oil of commercial quality and in paying quantities was encountered in the first or any subsequent test well drilled under the Fidelity Operating Agreement on the Cedar Creek Anticline, Fidelity Gas Company was required to commence drilling of an additional well or wells within one year from the completion of the first commercial well, and so on, with the purpose of progressively extending the production limits of said Anticline toward and upon the lands covered by each Fidelity Operating Agreement.

XV.

Acting pursuant to said agreements, Fidelity Gas Company, between 1935 and 1938, drilled three non-commercial test wells on the Cedar Creek Anticline, the last of which wells was abandoned as non-commercial in July or August, 1948. That no additional drilling was done by Fidelity Gas Company or anyone on its behalf until May, 1941, as hereafter appears.

XVI.

From September of 1935 through January of 1939 defendant Fidelity Gas Company carried on extensive negotiations with The California Company, a corporation, with the view of having the latter company participate in conducting the program initiated under the Fidelity Operating Agree-

ment for the development of the Cedar Creek Anticline, including the lands and interests of plaintiffs. After conducting a geophysical survey of an area deemed at that time as the most favorable location for a test well, The California Company concluded negotiations and rejected all proposals in January of 1939.

XVII.

Immediately after termination of negotiations with The California Company, defendant Fidelity Gas Company entered into negotiations with The Carter Oil Company, a corporation, for the purpose of having the latter company participate in conducting the program initiated under the Fidelity Operating Agreement for the development of the Cedar Creek Anticline, including the lands and interests of plaintiffs. Such negotiations culminated in agreements between the parties, executed in 1940, under the terms of which The Carter Oil Company drilled a fourth non-commercial deep test well on the Cedar Creek Anticline. Such well was commenced in May of 1941 and completed in January of 1942.

XVIII.

World War II defense demands made it difficult to obtain drilling materials fabricated from steel; particularly for the purpose of drilling test wells in a so-called "wildcat" area. Operators who were successful in obtaining steel drill pipe and well casing during said period of time did so only upon a satisfactory showing that such materials would be used in developing established productive fields near available marketing facilities.

XIX.

During 1947 negotiations were commenced by Fidelity Gas Company with J. E. Manning and others looking to further development of the Cedar Creek Anticline. These negotiations resulted in a contract with Husky Refining Company in 1947 for the purpose of having the latter company participate in conducting the program initiated under the Fidelity Operating Agreement for the development of the Cedar Creek Anticline, including the lands and interests of plaintiffs. In May of the following year Husky commenced operations on the fifth deep test well to be drilled on the Cedar Creek Anticline. Such well was completed as a dry hole in May of 1950.

XX.

Early in 1950, the three defendants herein commenced negotiations which culminated in the execution of an operating agreement on April 10, 1951, under the terms of which defendant Shell Oil Company agreed to participate in conducting the program initiated under the Fidelity Operating Agreement for the development of the Cedar Creek Anticline, including the lands and interests of plaintiffs.

XXI.

Acting pursuant to the terms of the agreement of April 10, 1951, and in reliance on the validity of the Fidelity Operating Agreements, defendant Shell Oil Company accomplished extensive geological and geophysical surveys of the Cedar Creek Anticline, and on July 8, 1951, commenced drilling

a well which in January, 1952, was completed as the first deep test well on the structure capable of producing oil in commercial quantities. Defendant Shell Oil Company has made commercial discoveries of oil to the north and south of the lands claimed by plaintiffs, has drilled more than fifty-three wells on the Cedar Creek Anticline to the time of trial and has expended approximately \$12,000,000 in conducting the program created by the Fidelity Operating Agreement.

XXII.

At no time have defendants evidenced any intention, or taken any action, to abandon their rights on the Cedar Creek Anticline under the Fidelity Operating Agreement and, specifically, said defendants have not evidenced any such intention, or taken any such action, with respect to the interests of plaintiffs which are committed to said agreement.

XXIII.

That on April 27, 1951, defendants Fidelity Gas Company and Montana-Dakota Utilities, by letter, advised all the plaintiffs of the making of the operating agreement with Shell Oil Company on April 10, 1951, and further advised them of Shell's proposed operations under said agreement; that notwithstanding their knowledge, at least, from shortly after April 27, 1951, that defendants Fidelity Gas Company and Montana-Dakota Utilities Company were claiming interests in said above described lands by virtue of the Fidelity Operating Agreements, and had subleased these interests to

Shell Oil Company, and that Shell Oil Company was preparing to spend large sums of money on the development of said Anticline in reliance upon the validity of the Fidelity Operating Agreements and the Shell Agreement with Fidelity Gas Company and Montana-Dakota Utilities Company, these plaintiffs remained silent and made no claim that the Fidelity Operating Agreement had expired or been terminated, until the filing of this action on February 2, 1953.

XXIV.

As a result of the development and other activities of the defendants, the values of oil and gas interests on the Cedar Creek Anticline, including the interests of plaintiffs herein, have been greatly enhanced.

XXV.

All of the development and other activities carried on by the defendants were performed in reliance on the fact that the Fidelity Operating Agreements covering plaintiffs' interests, and other similar interests on the Cedar Creek Anticline, were valid, subsisting and in full force and effect.

XXVI.

It was not until the value of plaintiffs' interests had been greatly enhanced, and the oil producing possibilities of their properties were demonstrated by the development work and expenditures of defendants, that any claim was made by plaintiffs to the defendants that the Fidelity Operating Agreements were no longer in effect.

XXVII.

The lands in which plaintiffs claim interests are located near the center of the Cedar Creek Anticline and if the relief prayed for in plaintiffs' amended complaint is granted, the future development for the production of oil from said structure, as now planned and carried on by defendant Shell Oil Company, will be impaired and the benefit to be derived by defendants from development of plaintiffs' lands will be lost.

XXVIII.

At no time have the plaintiffs, or any of them, served a written notice of default, upon any of the defendants, with respect to the performance of drilling, operating or producing obligations of the Fidelity Operating Agreements.

XXIX.

At approximately the same time that the Fidelity Operating Agreements were executed, as hereinabove found, plaintiffs, or their predecessors in title, entered into a Co-operative or Unit Plan of Development, Unit No. 5, Cedar Creek Anticline. While said agreement applies only to operations for the development, production and marketing of natural gas from the Judith River Sand in the lands hereinabove described, plaintiffs, or their predecessors, granted to the operator, now defendant Montana-Dakota Utilities Company, the right to commit all of their interests, including oil and gas below the Judith River Sand, to any similar unit plan of operations approved by the Secre-

tary of the Interior. Plaintiffs failed to introduce any evidence which would affect the continuing validity of such authority to unitize their interests.

XXX.

At approximately the same time that the Fidelity Operating Agreements and the Co-operative or Unit Plan of Development, Unit No. 5, were executed, plaintiffs, or their predecessors, entered into gas purchase agreements, whereby they agreed to sell, and defendant Montana-Dakota Utilities Company agreed to buy, natural gas produced from the Judith River Sand in lands committed to said Unit No. 5.

XXXI.

The terms of the Gas Purchase Agreements, Gas Unit Agreement and Fidelity Operating Agreements were discussed at a meeting in Billings, Montana, in 1934, between representatives of the United States Geological Survey, Fidelity Gas Company and associated companies and some of the predecessors in interest of plaintiffs; that thereafter said three agreements were executed by the plaintiffs, or their predecessors in interest, for the purpose of creating a comprehensive program for exploring, producing and marketing oil and gas from horizons above and below 2000 feet on the Cedar Creek Anticline.

From the foregoing Findings of Fact the Court makes the following

Conclusions of Law

I.

This Court has jurisdiction of this action.

II.

Because of the absence of evidence as to what constitutes good oil field practice in a wildcat area as regards the time for commencing drilling of an additional well after the completion of an unsuccessful well, the Court is unable to conclude whether the Fidelity Operating Agreements expired by their own terms or not.

III.

None of the rights granted Fidelity Gas Company by the Fidelity Operating Agreements have been abandoned by Fidelity Gas Company.

IV.

Plaintiffs, and each of them, are guilty of laches and barred from obtaining a judgment and decree of this Court cancelling or forfeiting the Fidelity Operating Agreements to which they have committed their respective interests.

V.

Plaintiffs, and each of them, are estopped from obtaining a judgment and decree of this Court cancelling or forfeiting the Fidelity Operating Agreements to which they have committed their respective interests.

VI.

Plaintiffs, and each of them, have waived any right to obtain a judgment and decree of this Court cancelling or forfeiting the Fidelity Operating Agreements to which they have committed their respective interests.

VII.

The Fidelity Operating Agreements, Gas Purchase Agreements and Co-operative or Unit Plan of Development, Unit No. 5, Cedar Creek Anticline, all as more fully described in the second defense of defendants' answer to all causes of action alleged in the amended complaint, are valid, subsisting and in full force and effect as between the plaintiffs and these defendants.

VIII.

Plaintiffs, and each of them, hold and own their respective interests, as defined in Findings I through XII, inclusive, subject and subordinate to all of the terms and conditions of the instruments described in the second defense of defendants' answer to all causes of action alleged in the amended complaint.

IX.

Defendants are entitled to a judgment for costs and disbursements incurred herein.

Judgment is hereby ordered to be entered accordingly.

Done and dated this 12th day June, 1956.

/s/ W. D. MURRAY

United States District Judge

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND
DISBURSEMENTS

February 25, 1953—Fees to Clerk of Court on removal—	\$15.00
Premiums on removal bonds	40.00
F. W. DeWolf—witness fee—2 days attend- ance at \$4.00 per day plus subsistence at \$5.00 per day	18.00
Mileage from out of state, 100 miles at 7c per mile	7.00
H. F. Davies—Witness fees—1 day attend- ance at \$4.00 per day plus subsistence at \$5.00 per day	9.00
Mileage from out of state	7.00
Winston Cox—Witness fees—1 day at \$4.00 per day	4.00
(Witness fees under 28 U.S.C. 1821 and Rule 70 this Court.)	
TOTAL	\$100.00

Costs taxed @ \$100.00 June 29, 1956. E. Warren
Toole, Clerk; by C. G. Kegel, Deputy.

State of Montana

County of Yellowstone—ss.

A. F. Lamey, being first duly sworn, deposes and
says: That he is the attorney for the defendants;
that he has knowledge of the facts relative to the
above costs and disbursements; that the items in
the above memorandum are correct, and have been

paid; that the said disbursements have been necessarily incurred in the said cause; and that the services charged therein have been actually and necessarily performed as therein stated.

/s/ A. F. LAMEY

Subscribed and sworn to before me this 19th day of June, 1956.

[Seal] /s/ HELEN B. SMITH

Notary Public for the State of Montana residing at Billings, Montana. My Commission expires Sept. 10, 1958.

[Endorsed]: Filed June 19, 1956.

[Title of District Court and Cause.]

NOTICE OF TAXATION OF COSTS

To: Cedar Creek Oil and Gas Company, International Trust Company, H. C. Smith, Susan M. Wight, and W. B. Haney, Plaintiffs, and Leif Erickson, 317 Power Block, Helena, Montana:

You will please take notice that on Friday, the 29th day of June, 1956, at 10:00 A.M., at Billings, Montana, application will be made to the above Court to have costs and disbursements taxed against the plaintiffs.

Dated this 18th day of June, 1956.

JOHN C. BENSON

ARMIN M. JOHNSON

RODGER NORDBYE

RAYMOND HILDEBRAND

ARTHUR F. LAMEY

/s/ By A. F. LAMEY

Attorneys for Defendants

[Endorsed]: Filed June 19, 1956.

In the United States District Court, District
of Montana, Billings Division

Civil No. 1470

CEDAR CREEK OIL AND GAS COMPANY,
a corporation; INTERNATIONAL TRUST
COMPANY, a corporation; MONDAKOTA
GAS COMPANY, a corporation; H. C.
SMITH; SUSAN M. WIGHT; and W. B.
HANEY, Plaintiffs,

VS.

FIDELITY GAS COMPANY, a corporation;
MONTANA-DAKOTA UTILITIES COM-
PANY, a corporation; and SHELL OIL
COMPANY, a corporation, Defendants.

JUDGMENT

The above cause came on regularly for trial before the Honorable W. D. Murray, United States District Judge for the District of Montana, sitting without a jury at Billings, Montana, on April 13, 1955. On motion of counsel for plaintiffs the

third and fourth causes of action of plaintiffs' amended complaint were dismissed. Oral and documentary evidence was received in support of the pleadings of the parties. The parties having rested, the case was submitted to the Court and taken under advisement; and the court having made and filed Findings of Fact and Conclusions of Law and ordered judgment to be entered accordingly,

It Is Ordered, Adjudged and Decreed that the Fidelity Operating Agreements, Gas Purchase Agreements and Co-operative or Unit Plan of Development, Unit No. 5, Cedar Creek Anticline, all as more fully described in the second defense of defendants' answer to all causes of action alleged in the amended complaint, are valid, subsisting and in full force and effect as between the plaintiffs and these defendants.

It Is Further Ordered, Adjudged and Decreed that plaintiffs, and each of them, hold and own their respective interests, as defined in Findings of Fact I through XII, inclusive, subject and subordinate to all of the terms and conditions of the instruments described in the second defense of defendants' answer to all causes of action alleged in the amended complaint.

It Is Further Ordered, Adjudged and Decreed that the defendants have judgment for their costs incurred herein in the sum of \$100.00.

Dated this 2nd day of July, 1956.

/s/ W. D. MURRAY

Judge

[Endorsed]: Filed, entered and noted in Civil Docket July 3, 1956.

[Title of District Court and Cause.]

JUDGMENT ROLL

The following documents constitute the Judgment Roll:

Petition for Removal.

Notice of Removal.

Motion of Defendants to Dismiss.

Plaintiffs' Motion to Remand.

Affidavit in Support of Motion to Remand.

Order Denying Motion to Remand.

Answer of all Defendants.

Motion for Leave to File Reply.

Order granting Leave to File Reply.

Reply.

Memorandum of Court.

Findings of Fact, Conclusions of Law and Order for Judgment.

Judgment.

United States of America

District of Montana—ss.

I, E. Warren Toole, Clerk of the United States District Court for the District of Montana, do hereby Certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Witness my hand and seal of said Court this 3rd day of July, 1956.

[Seal] E. WARREN TOOLE

Clerk

/s/ By ELIZABETH C. McKEE

Deputy

[Endorsed]: Filed July 3, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The above named Court and to the Clerk thereof, and to Fidelity Gas Company, a corporation, Montana-Dakota Utilities Company, a corporation, and Shell Oil Company, a corporation, and to John C. Benson, Armin M. Johnson, Rodger Nordbye, 1260 Northwestern Bank Building, Minneapolis 2, Minnesota, Raymond Hildebrand, Glendive, Montana and Arthur F. Lamey, 500 Electric Building, Billings, Montana, their Attorneys:

Notice is hereby given that Cedar Creek Oil and Gas Company, a corporation, International Trust Company, a corporation, H. C. Smith, Susan M. Wight and W. B. Haney, the plaintiffs above named hereby appeal to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 3rd day of July, 1956.

Dated this 27th day of July, 1956.

/s/ LEIF ERICKSON

Attorney for Appellants

[Endorsed]: Filed July 27, 1956.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL FOR COSTS
AND DAMAGES

Amount \$250.00.

Whereas, the Cedar Creek Oil and Gas Company the plaintiff in the above entitled action is about to appeal to the United States Court of Appeals, Ninth Circuit from a judgment entered against said plaintiff in said action in the above entitled District Court, in favor of the said defendants on the 3rd day of July 1956, for One Hundred and no/100 (\$100.00) Dollars damages and cost of suit and

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned does hereby undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding two hundred fifty dollars to which amount we acknowledge ourselves duly bound.

In Witness Whereof, the undersigned Surety has caused these presents by its duly authorized representative, and its corporate seal affixed at Billings, Montana, this 23rd day of July, A.D. 1956.

NATIONAL SURETY CORP.

/s/ By S. M. WEST

Attorney-in-Fact

S. M. WEST COMPANY

/s/ By S. M. WEST

Agent

[Endorsed]: Filed August 20, 1956.

[Title of District Court and Cause.]

MOTION

Appellants show to the Court as follows:

(1) Notice of Appeal to the United States Court of Appeals for the Ninth Circuit was filed herein on or about the 30th day of July, 1956;

(2) On August 21, 1956, appellants filed their Designation of Record on appeal herein;

(3) The Clerk will be unable to complete the preparation of the record on appeal herein within the 40 days from the date of filing of such Notice of Appeal for the reason that the Designation of Record was filed late, and for the reason that members of the Clerk's staff are on vacation.

Wherefore, appellants move the Court for an order extending the time within which the Record on Appeal may be filed and the appeal docketed in said Court of Appeals to September 21, 1956.

Dated this 23rd Day of August, 1956.

/s/ LEIF ERICKSON

[Endorsed]: Filed August 25, 1956.

[Title of District Court and Cause.]

ORDER

A Motion having been filed by appellants to extend the time for filing the record and docketing the appeal until September 21, 1956, and good cause appearing therefore,

It Is Ordered that the time for filing the record

and for docketing the appeal in the above entitled cause is extended until September 21, 1956.

Dated this 24th day of August, 1956.

/s/ W. D. MURRAY

Judge

[Endorsed]: Filed, entered and noted in Civil Docket August 25, 1956.

[Title of District Court and Cause.]

REQUEST FOR CERTIFICATION AND
TRANSMISSION OF RECORD PURSU-
ANT TO RULE 75 (j) OF THE FEDERAL
RULES OF CIVIL PROCEDURE

To: E. Warren Toole, Clerk of the above named
Court

The Defendants above named desire to docket in the United States Court of Appeals for the Ninth Circuit the appeal taken by Cedar Creek Oil and Gas Company, International Trust Company, H. C. Smith, Susan M. Wight and W. B. Haney, Plaintiff-Appellants, pursuant to the Notice of Appeal, filed on July 27, 1956, prior to the time the complete record on appeal is settled and certified, and therefore request pursuant to Rule 75 (j) of the Federal Rules of Civil Procedure that you certify and transmit to the United States Court of Appeals for the Ninth Circuit a copy of the following records and proceedings in the above entitled matter which are on file in your office:

1. The Amended Complaint.

2. The Petition of the Defendants for the removal of the case from the District Court of the 16th Judicial District of the State of Montana to the United States District Court, District of Montana, Billings Division, and the Bond on Removal.

3. Answer of Defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company to the Amended Complaint.

4. The Reply.

5. The Pre-Trial Order, dated February 16, 1955.

6. Plaintiff's Trial Brief, dated March 17, 1955.

7. Memorandum and Findings of Fact and Conclusions of Law, dated June 12, 1956.

8. Docket Entries with reference to Memorandum, Findings of Fact, Conclusions of Law and Order for Judgment, June 13, 1956.

9. Docket Entry of June 13, 1956, relative to mailing of copies of Memorandum and Findings, etc. to Counsel.

10. Judgment.

11. Docket Entry with reference to Judgment.

12. Notice of Appeal.

13. Docket Entry with reference to Notice of Appeal.

Dated This 28th day of August, 1956.

ARTHUR F. LAMEY
RAYMOND HILDEBRAND
JOHN C. BENSON
ARMIN M. JOHNSON
RODGER L. NORDBYE

/s/ By ARMIN M. JOHNSON

Of Counsel: Coleman, Jameson & Lamey, Faegre &
Benson. Of Counsel for Defendant, Shell Oil
Company, Howard M. Gullickson, Charles N.
Wagner.

[Endorsed]: Filed September 1, 1956.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Montana—ss.

I. E. Warren Toole, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the papers accompanying this certificate, except and save those consisting of minute entries, are the originals filed in Case No. 1470, Cedar Creek Oil and Gas Company, a corporation; International Trust Company, a corporation; Mondakota Gas Company, a corporation; H. C. Smith; Susan M. Wight; and W. B. Haney, Plaintiffs, vs. Fidelity Gas Company, a corporation; Montana Dakota Utilities Company, a corporation; and Shell Oil Company, a corporation, Defendants, and that those papers accompanying this certificate consisting of minute entries are full, true and com-

plete copies of the original minute entries made by said Court in said cause, and that all of said papers were designated by the respective parties as the record on appeal herein, which record on appeal consists of the following:

Petition for Removal, with Alias Summons and Amended Complaint attached thereto.

Bond on Removal.

Notice of Removal, with copy of Petition for Removal, copy of Alias Summons and of Amended Complaint attached thereto.

Motion for order extending time to appear.

Order granting time to appear.

Defendants' Motion to Dismiss.

Order of Disqualification by Judge Pray.

Stipulation for taking of deposition of Herman C. Smith, & W. B. Haney.

Order for taking of deposition of Herman C. Smith.

Motion to Remand to State Court.

Affidavit in Support of Motion to Remand.

Notice of Filing Motion to Remand.

Brief of Plaintiffs in Support of Motion to Reman.

Praecipe to add name of Howard M. Gullickson as associate counsel for defendant Shell Oil Company.

Motion of defendants for order extending time for brief.

Order granting extension of time for defendants' brief.

Stipulation for extension of time for reply brief.

Order granting additional time for reply brief.

Brief of defendants Fidelity Gas Co. and Montana-Dakota Utilities Co. in opposition to motion to remand.

Brief of Defendant Shell Oil Company in opposition to motion to remand.

Depositions of W. B. Haney and Herman C. Smith.

Stipulation for taking of depositions, of Cecil W. Smith, Thomas A. Jirik and George Seivers.

Order for Taking Depositions.

Deposition of Robert J. Sullivan.

Order denying motion to remand.

Stipulation for taking depositions of Susan M. Wight, Thomas A. Jirik, and John Wight.

Deposition of John Wight. (cover)

Deposition of Susan M. Wight.

Depositions of Cecil W. Smith and George H. Seivers.

Answer of Defendants Fidelity Gas Co., et al.

Affidavit of Mailing Answer.

Stipulation for extension of time for plaintiffs to file responsive pleadings.

Motion for Leave to File Reply.

Order to File Reply.

Depositions of R. M. Heskett and Cecil W. Smith.
Reply.

Order setting case for trial.

Order vacating setting of case for trial.

Order setting case for pre-trial conference.

Minute entry of pre-trial conference.

Minute entry of further hearing on pre-trial conference.

Pre-Trial Order.

Reporter's Notes.

Order setting case for trial.

Letter of Coleman, Jameson & Lamey for issuance of Subpoena.

Trial Brief of Defendants.

Affidavit of Mailing trial brief.

Notice to Produce.

Subpoena Duces Tecum.

Minute entry of trial. April 13, 1955.

Stipulation of Facts as to First and Second Causes of Action.

Stipulation of Facts as to Fifth and Sixth Causes of Action.

Stipulation of Facts as to Seventh and Eighth Causes of Action.

Stipulation of Facts as to Ninth and Tenth Causes of Action.

Stipulation of Facts as to Eleventh and Twelfth Causes of Action.

Deposition of John Wight.

Minute entry of trial. April 14, 1955.

Deposition of Thomas A. Jirik.

Deposition of George H. Seivers.

Minute entry of trial. April 15, 1955.

Minute entry of trial. April 16, 1955.

Reporters Notes and Transcript of Testimony, in 2 volumes.

Minute entry of Order granting plaintiffs time for brief.

Plaintiffs' Brief.

Plaintiffs' Proposed Findings of Fact and Conclusions of Law.

Brief of Defendants.

Schedule of Exhibits, and Summary of Testimony.

Affidavit of Mailing brief of defendants.

Defendants' Proposed Findings of Fact and Conclusions of Law.

Minute entry of Order extending time for plaintiffs' brief.

Minute entry of Order granting plaintiffs time for supplemental brief.

Order granting defendants time for reply brief.

Reply Brief of Defendants.

Memorandum of the Court.

Findings of Fact and Conclusions of Law and Order for Judgment.

Memorandum of Costs and Disbursements.

Notice of Taxation of Costs.

Affidavit of Mailing cost bill and notice of Taxation of costs.

Judgment.

Judgment Roll cover.

Notice of Appeal.

Undertaking on Appeal.

Appellants' Designation of Record on Appeal.

Application for extension of time for filing Record on Appeal.

Order extending time for filing Record on Appeal.

Defendants' Request for Certification and Transmission of Record on Appeal.

I further certify that Plaintiffs' Exhibits Nos, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 49, 50, 51, 52, 53, 54, and 61, and Defendants' Exhibits Nos. 1, 1A, 2, 3, 4, 5, 16, 17, 18, 19, 20, 21, 40, 41, 42, 43, 44, 45, 46, 47, 48, 55, 56, 57, 58, 59, and 60, are the originals introduced in evidence in said cause and are part of the record on appeal herein.

I further certify that the following group of papers, bearing no filing marks or exhibit numbers, and accompanying this certificate, were lodged with the Court in said cause, to-wit:

Reply Brief of Plaintiffs.

Plaintiffs Supplemental Brief.

Memorandum of Defendants for Pre-Trial Conference

Land Map, Glendive Area—Shell Oil Co., Rocky Mountain Division.

Blank Form 247, Operating Agreement.

Blank Form 250, Co-Operative or Unit Plan of Development.

Witness my hand and the seal of said Court this 8th day of September, 1956.

[Seal] /s/ E. WARREN TOOLE

Clerk as aforesaid.

[Title of District Court and Cause.]

CLERK'S SUPPLEMENTAL CERTIFICATE

United States of America,
District of Montana—ss.

I, E. Warren Toole, Clerk of the United States District Court in and for the District of Montana, do hereby certify in relation to Case No. 1470, Cedar Creek Oil and Gas Company, a corporation; International Trust Company, a corporation; Mondakota Gas Company, a corporation; H. C. Smith, Susan M. Wight; and W. B. Haney, Plaintiffs, vs. Fidelity Gas Company, a corporation; Montana Dakota Utilities Company, a corporation; and Shell Oil Company, a corporation, Defendants, that the docket entries heretofore transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit with the record on appeal in said case, were and are a full, true and complete copy of the original docket entries in said case; and further that the following were and are a full, true and complete copy of the original docket entries in said case, appearing therein under date of June 13, 1956, to-wit:

June 13, 1956—Filed Memorandum of the Court.

June 13, 1956—Filed Findings of Fact, Conclusions of Law & Order for Judgment in favor of Defendants, for costs & disbursements herein.

June 13, 1956—Mailed copies of Memorandum & Findings to counsel herein.

I further hereby certify that the "Plaintiff's

tiffs. Mr. A. F. Lamey, Billings, Montana, Attorney for all Defendants. Messrs. Armin Johnson and Rodger L. Nordbye, Minneapolis, Minnesota, Attorneys for Defendants Montana-Dakota Utilities Co. and Fidelity Gas Company. Messrs. Charles N. Wagner and Howard M. Gullickson, Casper, Wyoming, Attorneys for Defendant Shell Oil Company.

TRANSCRIPT OF EVIDENCE

The above cause came on regularly for trial before the Hon. W. D. Murray, United States District Judge for the District of Montana, sitting without a jury at Billings, Montana, on April 13, 1955. The plaintiffs were represented by their counsel, Messrs. Leif Erickson and J. R. Richards, of Helena, Montana; all the defendants were represented by their counsel, Mr. A. F. Lamey, of Billings, Montana, the defendants Fidelity Gas Company and Montana-Dakota Utilities Company were represented by their counsel, Messrs. Armin Johnson and Rodger L. Nordbye, of Minneapolis, Minnesota, and the defendant Shell Oil Company was represented by its counsel, [1]* Messrs. Charles N. Wagner and Howard M. Gullickson, of Casper, Wyoming.

Thereupon, the following proceedings were had:

Court: Number 1470, Cedar Creek Oil, vs. Fidelity Gas, are the parties ready?

Mr. Erickson: We are.

Mr. Lamey: Yes, your Honor.

Court: Very well, let's proceed.

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

Mr. Erickson: May it please the Court, in this matter there has been a pretrial conference and trial briefs have been filed, but in the view I take after my extensive study of the matter, it seems to me it might be worthwhile for the plaintiff to make an opening statement here which may involve some reference to points of law rather than evidence, but the purpose of it is to apprise the Court of the course the evidence of the plaintiffs will take. If I have the Court's permission, I would like to make a brief opening statement.

Court: Yes.

Mr. Erickson: As the Court is aware from the pretrial conference and from its examination of the pleadings and record, which has been very extensive on the part of the Court, the Court is aware this is an action in the nature of one to quiet title. Basically, the situation is this: these plaintiffs are holders of government leases and leases on privately owned lands. The instruments which the action is directed [2] against originally were two, one, the operating agreement, so designated, under which Fidelity Gas Company, a wholly owned subsidiary of Montana-Dakota Utilities, was the nominal and named lessee, or sublessee; and the other instrument is an agreement referred to as the gas unit agreement, and it covers by its terms the defendants development and operation of the gas sands in the area generally covered. In the answer, the defendants set up as a basis of their title the so-called operating agreement, and the Court is aware from its study of this it is a little difficult to keep all the

agreements separated, but the operating agreement is the agreement with Fidelity Gas Company. It is the only one in which Fidelity Gas is a party. In addition, the defendants set up as the basis for their claim of interest certain gas purchase agreements, and those various agreements have been covered by the pretrial order and are a part of the file. Now, it is the position of the plaintiffs that the only one of these instruments which purported to give any interest to these defendants is the so-called operating agreement, or Fidelity Gas agreements. Those agreements were negotiated with different owners, so don't bear the same date, but they were made somewhere along in 1934. Under the terms of that agreement, which I must say in many regards is most vague, an agreement which we will point out was prepared by the defendant Fidelity Gas, and printed by the Fidelity Gas, and Fidelity Gas then being responsible [3] for any ambiguities that may be in the instrument; the instrument was signed by a number of holders of Federal leases and fee leases, including these plaintiffs. Now, the primary purpose of the agreement, as indicated by Paragraphs 2 and 3 of the agreement——

Court: Of the operating agreement?

Mr. Erickson: Yes.

Court: I have it here.

Mr. Erickson: Yes, that is what I am referring to. The Fidelity Gas Company assumed an obligation to drill test wells as provided in this agreement. That was a definite promise, a definite obligation, an enforceable obligation on the part of Fidel-

ity Gas under the terms of the agreement. It was provided that the test well might be drilled on the southern end, and on this portion of the whole Cedar Creek Anticline (indicating). I think the Court is familiar with the map, and this general area. This is south, of course. The Unit 5 I represent is up in here (indicating). The contract provided the first test well might be drilled down in these lower units. A well was drilled there in 1937. After the first well was drilled, which is the N.P. Number 1, it is called, Fidelity Gas drilled a well on one of the properties here involved in Unit 5. I think there is some doubt as to the completion date, but the completion date was approximately the middle of January, 1937. That well was dry. There was some small production down [4] below there. We agree that the two wells and a subsequent one drilled at about the same time in the lower end were drilled pursuant to the Fidelity Gas agreement, satisfying the obligation of Fidelity insofar as drilling those wells is concerned.

The next important feature of the contract is Paragraph 4, and on Paragraph 4, the plaintiffs' case largely rests. Paragraph 4 of the Fidelity agreement says, "After completion or abandonment of said test well, second party shall have the right, at its option, to prosecute such further drilling of wells under like terms and conditions, and at such times as shall be deemed by it to be good oil field practice," and so forth, and concluding with the sentence, "In the event that under customary oil field practice in prospecting a wild cat area, second

party shall be unable to commence the drilling of a new test well before September 1st of any year, the commencement of any such well may be deterred, at the option of second party, until the following first day of April." Now, it will be the position of the plaintiffs that this was the manner and means by which Fidelity Gas could have kept the contract alive after the first year, by proceeding with test drilling after the termination of the first year; that they did not drill any more test wells after that time, and particularly within the period which under Section 4 we think is contemplated, a year, or if it happens to run into September, a matter of 18 months. That is basically our position insofar as this contract is concerned, [5] that the contract ipso facto terminated by its own terms at the end of the second year, or 18 months, when no new test well was drilled, and our testimony will show no new test well was drilled.

Anticipating, by reason of the trial brief of the defendants, just a little bit, the trial brief indicates the defendants take the view that this is not a lease or sublease, and doesn't come within the rule often announced by the Montana Court and all Courts that in the case of these agreements dealing with oil and gas, where one party is bound to perform, and the other has only an option, that forfeiture is favored. The defendants have argued that this is not the type of instrument which comes within that general rule. We would like to point out to the Court at the outset, at the top of page 2, and this is the language which is furnished by the defendant Fi-

delity Gas, it is its contract, and it specifically says, "The first party"—that is our plaintiffs insofar as this is concerned—"does hereby devise and sublease and sublet unto said second party" and so on. Further, there is reference to the lessor in the contract, and we believe in the light of the language used by the defendant Fidelity Gas, which we think is binding on M.D.U., that they would be now estopped to come in and contend that this is other than a lease or sublease, and we believe the terms of the agreement show it is a sublease and intended to be that. [6]

Further, it would appear that the defendants' position is and will be that once they drilled the first test well on this property in the first year, from then on they had an interest in this land that lasted into perpetuity, that being done, that they had no further obligation to do anything further. The contract, which we say is prepared by the defendant Fidelity Gas has no term, a most unusual contract. Most of them have a provision that the contract shall run so long as oil and gas is produced. Nothing of that sort appears in this contract. We have to look to the fact that it is a lease, and look to Paragraph 4 to get some idea of what the lease is really intended to do.

Anticipating further the position of the defendants, as revealed by their pleadings, and by their brief, the defendants take the position that the lease can only be terminated by a declaration of forfeiture under Paragraph 2. It is about the eighth or ninth line above the bottom of the paragraph, "For-

feiture of all of the rights of second party as to respective lands upon which it shall be in default in the performance of the drilling, operating or producing obligations under this agreement, and its failure to proceed to remedy such default within 30 days after receipt of written notice from first party thereof, shall be the exclusive remedy of first party against second party on account of any such default hereunder." Now, it is our position that that forfeiture clause has relation [7] only to the obligation to drill the first test well; then if there is a discovery of oil or gas in paying quantities, then comes into being the obligation on the part of the Fidelity Gas to operate and produce, and the forfeiture clause, in the view we take, has application only to those obligations that were assumed by Fidelity, and we say as to drilling further test wells after the first one was dry, there was no obligation on the part of Fidelity to do anything. They could just walk off and leave it, and we say they did. They couldn't be in default, there was no default to declare, they hadn't assumed to do anything but drill the first well, which they did. We want to call, also, the Court's attention to the fact there are several provisions in the contract permitting Fidelity to surrender all its interests, and it is a situation covered by the numerous cases which we have cited to the Court on the matter of forfeiture and on the matter of options, and that will be developed more fully in briefs which we hope to be permitted to file later.

Now, with reference to the Unit Agreement,

which has been designated, I think, now as Exhibit 3, and it is attached to the pleadings—that is the one entitled “Cooperative or Unit Plan of Development, Unit 5,” the Court will recall that originally in our complaint we sought to have that declared to be void for failure of consideration, but that portion of the complaint was deleted; but it is our position that by the [8] express language of the Unit 5 agreement, it can have no possible application to these deeper sands. Again the Unit Plan, we will show, was prepared by the defendant Montana-Dakota Utilities Company, and the language in it is its language, and not ours. I call the Court’s attention to Paragraph 17, in which it is recited that nothing in the contract shall have the effect of creating a partnership or any interest in the lands committed, and each ones respective right, title and interest in the respective tracts shall remain unaffected by the Unit contract. Then, Paragraph 19, “That nothing herein contained shall be construed as affecting or passing title to any lands, leases, or permits, but the Operator shall acquire operating rights only. The Operator shall have the prior right to enter upon and occupy so much of the surface of the lands included herein as is necessary to carry on operations in Judith River Sands hereunder, but the owners and holders of lands, leases or permits subject hereto reserve unto themselves the right to occupy and use by themselves, their grantees, lessees, licensees”—and so forth—“for any and all purposes not inconsistent with the right herein given the Operator to operate the Judith River

Sands." Further, in Paragraph 22, there is a provision that any signatory to the contract can freely assign his interest without the consent of the Operator or anyone else, which we think makes it even clearer that this Unit Agreement, Unit 5, could not possibly be a blemish or [9] defect on our interest between 2,000 feet. I think the Court is aware of the fact the Fidelity Operating Agreement affects only the sands below 2,000 feet, and Unit 5 has application only to the Judith River Sands. When talking about the Operating Agreement in this action, we are primarily concerned with the sands below the 2,000 foot level.

We have pleaded, in addition to the fact that the contract was terminated by its own terms, that the defendants abandoned any interest that they might have under the Operating Agreement, and witnesses will be introduced and will testify to not only these direct and positive statements of the officers of Fidelity Gas and Montana-Dakota Utilities, but also testimony will be introduced to show conduct on the part of Fidelity Gas which indicated clearly their understanding that their failure to drill a further test well resulted in a termination of the contract, and that they had in fact abandoned any claim under this agreement.

We also will produce testimony that shows that the defendants are estopped now to claim any interest under this agreement; and we will point out to the Court by the testimony that the test well, which the defendants, we understand, will claim gives them a perpetual interest in our property, was

drilled in early 1937, and that a period something like 14 years has elapsed in which they gave no indication to any of the plaintiffs that they considered they had any interest in [10] our lands and leases; and now after the property has become potentially valuable because of oil discovery, they contend they can revive this long dead instrument, breathe life into it, giving them an interest in our lands, for which no consideration was paid, no delay rental or anything else.

In summary, that is the position the plaintiffs take in the manner.

Court: Do you want to make a statement at this time, Mr. Lamey?

Mr. Lamey: More just to the legal questions that have been suggested.

Court: Those have been covered in your brief. I have read your brief; I think I understand your position. I think we may proceed.

JOHN WIGHT

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Will you state your name? A. John Wight.

Mr. Erickson: At this time, your Honor, we would like to put in the various exhibits on which there was agreement by the pretrial order, and I believe that is with the agreement of [11] counsel.

Court: They are in by the agreement, aren't they?

(Testimony of John Wight.)

Mr. Lamey: It said they may be offered without further identification. I think a further offer would be in order.

Mr. Erickson: At this time, we offer Exhibit 1 and 1-A, the map.

Mr. Lamey: No objection.

Court: They are admitted.

(Defendants' Exhibits 1 and 1-A admitted.)

Mr. Erickson: And Exhibit 2, which is the Operating Agreement.

Mr. Lamey: Which, Fidelity?

Mr. Erickson: Yes.

Mr. Lamey: No objection.

Court: Admitted.

(Defendants' Exhibit 2 admitted.)

Mr. Erickson: Exhibit 3, which is the Unit Plan.

Mr. Lamey: No objection.

Court: Admitted.

(Defendants' Exhibit 3 admitted.)

Mr. Erickson: As to Exhibit 4, we presented a proposed Exhibit 4 which is not typical of the gas purchase agreements, and the matter has been discussed with counsel. We would like now to withdraw Defendants' Proposed Exhibit 4, and substitute a later copy. It is the same agreement, except it is more [12] typical of those gas agreements.

Mr. Lamey: That is agreeable, your Honor.

Court: Very well.

(Defendants' Exhibit 4 admitted.)

Mr. Lamey: You can mark this as Exhibit 4 and withdraw the other and not encumber the record.

(Testimony of John Wight.)

Court: Yes.

Mr. Erickson: At this time, your Honor, as you will recall, we determined at the pretrial conference to introduce documentary evidence as to title by stipulation, and I will have Mr. Richards—oh, counsel calls my attention to the fact that the plaintiffs now desire and do move to dismiss the causes of action Number 3 and 4. They are Mondakota Gas actions, and that has been called to the attention of opposing counsel.

Court: Causes 3 and 4 of your amended complaint?

Mr. Erickson: Yes, and then the comparable provisions in the reply.

Court: Very well.

Mr. Lamey: Those have to do with the Mondakota causes of action, I believe.

Court: Yes.

Mr. Erickson: At this time I will ask Mr. Richards to put in the documentary evidence on the title.

Court: Yes.

Mr. Richards: We were working right up until the time [13] Court started getting the documents ready, so the stipulations aren't signed.

Court: Do you want to take a few minutes to read them? Do you need some time?

Mr. Johnson: There will be some instruments, your Honor, we haven't had an opportunity to proof.

Mr. Richards: That is a point I was going to

(Testimony of John Wight.)

raise. There are some typewritten copies going in here which neither side has had an opportunity to proof. My thought was they could be introduced with the understanding we might correct any typographical errors that might be found later on.

Court: That would be fine.

Mr. Richards: With reference to Causes of Action 1 and 2, in both Causes of Action 1 and 2, the same lands are described in each cause of action, so referring to Paragraph of the First Cause of Action, the documents relative to 025044-A are found as Exhibits 1, 3 and 4 of the stipulation; as to the facts of the First and Second Causes of Action, the documents as to 025044-B are found as Exhibits 2, 3 and 4. In other words, United States Oil and Gas Leases 025044-A and B are Exhibits 1 and 2 to the stipulation; the Operating Agreement between the permittee, Mr. Warren, and Cedar Creek Oil and Gas is Exhibit 3, and then the assignment from Mr. Warren to Mr. Dousman of an undivided one-half interest is Exhibit 4. We have got the exhibits attached to the stipulation [14] and marked Exhibits 1, 2, 3 and 4 on this stipulation.

Court: Let me see it just a minute?

Mr. Richards: Perhaps they could be stapled to the stipulations and not marked as exhibits at all.

Court: The stipulation refers directly to each one of the exhibits.

Mr. Richards: Yes, sir.

Court: I think you can just file the stipulations with the documents.

(Testimony of John Wight.)

Mr. Richards: And staple the document to the stipulation. With reference to the Fifth and Sixth Causes of Action, the Third and Fourth having been dismissed, I would refer the Court to page 10 of the amended complaint, the plaintiffs' claim to the lands is based upon two Federal leases, and an assignment of those leases to Plaintiff International Trust Company. Exhibit 1 to this stipulation as to the Fifth and Sixth Causes of Action is Federal Lease 029521-A; Exhibit 2 is Federal Lease 029521-B, and Exhibit 3 is the assignment from the lessee to plaintiff International Trust Company.

Court: Very well.

Mr. Richards: Now, on the Seventh and Eighth Causes of Action, we refer the Court to Page 14 of the amended complaint, Paragraphs 4 and 5. We have stipulated, arrived at a partial stipulation in regard to those lands, and in this stipulation there is a disclaimer of interest for the plaintiffs of this [15] action of the South Half of the Northeast Quarter of Section 12, Township 8 North, which you will find the fifth line down in the first paragraph. We disclaim the interest we allege in our Amended Complaint for the purposes of this action; then, the second paragraph, the interest claimed there is covered by Exhibits 1, 2, 3 and 4, attached to this stipulation, which are the Oil and Gas Leases issued to Mildred Vinsel, 026954-A and B, the Operating Agreement on those leases by Mrs. Vinsel to George Norbeck, and the assignment of the Operat-

(Testimony of John Wight.)

ing Agreement from George Norbeck to Susan Wight, and those are attached to this stipulation.

Court: Very well.

Mr. Richards: Now, referring back——

Court: Pardon me, just a minute. Harry, what do you think about these stipulations. Each one of them has Exhibits 1, 2 and 3. Do you think keeping them attached to the stipulation would be sufficient segregation?

Clerk of Court: I was going to attach them firmly.

Court: Very well.

Mr. Richards: Referring back to that first description of land in Paragraph 4 on page 14 of the Amended Complaint, we were not able to stipulate as to the interest of the plaintiff Susan Wight in the North Half of the North Half of Section 10, and the South Half of the Northeast Quarter—excuse me, Southeast Quarter of Section 12 and the East Half [16] of the Southeast Quarter of Section 12. That interest is covered by the following documents which I would like to introduce in evidence at this time: A certified copy of Billings Federal Lease 021056-B. That would be Plaintiffs' Exhibit——

Clerk of Court: You didn't offer Number 5, marked in Butte, Mr. Erickson. Did you intend to do that? You had it laying up here.

Mr. Erickson: May I, out of order, then, offer 5 because it is marked, which is the agreement between Shell and M.D.U.?

(Testimony of John Wight.)

Mr. Lamey: No objection.

Court: Very well, it is admitted.

Defendants' Exhibit 5 offered in evidence and received.)

Mr. Wagner: We have no objection.

Mr. Richards: The next document is a certified copy of the assignment from George Norbeck and Jane Norbeck to Susan M. Wight of the Southeast Quarter of Section 12, Township 8 North, Range 59 East.

Mr. Wagner: We have no objection, your Honor.

Court: Very well, admitted.

(Plaintiffs' Exhibit 7 admitted in evidence.)

Mr. Richards: The next is an assignment from the Norbecks to Susan M. Wight of the North Half of the North Half of Section 10, Township 8 North, Range 59 East. That would be Exhibit 8. [17]

Court: What is the exhibit number of this now?

Mr. Richards: This is number 8.

Mr. Wagner: No objection, your Honor.

Court: Very well, Exhibit 8 is admitted.

(Plaintiffs' Exhibit 8 admitted in evidence.)

Mr. Richards: The next document is an Oil and Gas Lease, and this refers, your Honor, to the land described in Paragraph 5 on Page 14, an Oil and Gas Lease between—excuse me, I will correct that—a lease between W. A. Beck and Susie Beck and Norbeck Company, dated June 3, 1931.

Court: That is marked Exhibit 9?

Mr. Richards: Exhibit 9.

Mr. Wagner: No objection, your Honor.

(Testimony of John Wight.)

Court: Very well, Exhibit 9 is admitted.

(Plaintiffs' Exhibit 9 admitted in evidence.)

Mr. Richards: And the final document at this time as an exhibit is a partial assignment of that Beck lease by the Norbeck Company to Susan M. Wight, dated December 31, 1935.

Court: Exhibit 10?

Mr. Richards: Exhibit 10.

Mr. Wagner: No objection.

Court: Very well, Exhibit 10 is admitted.

(Plaintiffs' Exhibit 10 admitted in evidence.)

Mr. Richards: And we pass on to the Ninth and Tenth Causes of Action and refer to page 18 of the Amended Complaint, [18] and it is understood that any of these documents, any typographical errors we might find later on, we can pick up and correct. Referring to the first description of land in Paragraph 4 on Page 18, the plaintiffs' title to that land is shown by Exhibits 1, 2, 3 of this stipulation, which are the original Federal Leases 029750-A and B, and the assignment of those leases by the original lessee to the plaintiff H. C. Smith in this cause of action. Then, the next two paragraphs are covered by a Consolidated Lease and by the same items in the stipulation. In other words, we have the original Consolidated Lease as Item 4 in the stipulation; the Assignment of that Consolidated Lease by the Lessee to Black Hills Oil and Gas is Item 5, and the Assignment by Black Hills Gas and Oil to plaintiff H. C. Smith is item 6 in the stipulation. Referring to the last paragraph there, the plaintiffs' title

(Testimony of John Wight.)

to the interest involved there is deraigned from original Federal Lease 021056-B issued to George Norbeck. A copy of the lease is Exhibit 7 attached to this stipulation; then on December 10, 1934, George Norbeck assigned a portion of that lease which covered the land claimed by plaintiff H. C. Smith here to Harry A. Smith. That assignment is Exhibit 8 attached to this stipulation, and on August 9, 1939, Harry A. Smith assigned a portion of the land he had received to H. C. Smith, which is the land that H. C. Smith is claiming under this part of the stipulation, and is Number 9 on the stipulation. [19]

Court: Very well, the stipulation and its attached exhibits may be filed.

Mr. Richards: Then, referring to page 24 of the Amended Complaint for the Eleventh and Twelfth Causes of Action, the first description of land is deraigned in very much the same fashion, very much the same as the last one I talked about in 9 and 10. The original Federal Lease was 021506-B. It is Exhibit 1. George Norbeck assigned part of the lease to Harry A. Smith, Exhibit 2, and Harry A. Smith assigned part of this lease to W. B. Haney, Exhibit 3. The next two paragraphs cover the 63/360 interest and are deraigned exactly the same through the Black Hills Oil and Gas Company, as pointed out in 9 and 10, and that takes up numbers 4, 5, 6 and 7 of the stipulation; and that is all of the stipulations.

(Testimony of John Wight.)

Court: Very well, the stipulation and its exhibits may be filed.

Direct Examination—(Continued)

Q. (By Mr. Erickson): Where do you reside, Wight?

A. At Billings, in the Weston Apartment, Billings, Montana.

Q. How long have you been a resident of Billings?

A. Well, off and on, most of the time, I might say, for possibly 30 or 35 years.

Q. In what business are you engaged, Mr. Wight? A. Oil and gas and refining.

Q. You are not a party to this action, are you?

A. No.

Q. Do you have an interest in any of these properties here involved? A. I do.

Q. In which ones?

A. Well, I have a direct interest in International Trust.

Q. How does that interest come about?

A. I was the one that had the trust created, and it could be revoked by me at any time, and I also have a direct interest in the trust, and indirectly I have an interest in the Susan M. Wight. I also have an interest, a small interest in the Cedar Creek Oil and Gas and H. C. Smith and Haney.

Q. So, you are an interested witness in this proceeding? A. That's right.

Q. Have you been familiar with the develop-

(Testimony of John Wight.)

ment of what is denominated as the Cedar Creek anticline? A. I have.

Q. When did that interest originate, Mr. Wight?

A. I started leasing out land in about 1918 for the purpose of drilling for gas wells.

Q. Was that in the Cedar Creek area?

A. It was in the Cedar Creek area.

Q. Whereabouts did you acquire leases originally?

A. From practically one end, from the south there, clear up to the north and near the town of Glendive. [21]

Q. Had gas discoveries been made there prior to that time?

A. Yes, there had been some gas discoveries made prior to that time.

Q. Did your leasing activities continue?

A. They did continue until some time passed, up in the '30's; in fact, it continued even later than that.

Q. Now, can you give us an idea of about how—as you stated before, your leasing activities were around the area denominated as the Cedar Creek Anticline in Exhibit 1 and 1-A?

A. I had leased or acquired leases on approximately half of the structure. I think by 1925 or 1926, in the Cedar Creek field I had acquired leases on something like 85,000 acres.

Q. Did you hold those in your own name?

A. Some of them; and some of them in the name of a company we had by the name of Capital Gas

(Testimony of John Wight.)

Corporation; some were held in the name of another corporation of which myself and family had controlling interest named Montana Eastern Pipe Line Company. A lot of the leases were held in various individuals' names with which I had operating agreements and powers of attorney from them.

Q. Now, with relation to this activity in the Cedar Creek Anticline, did you yourself drill any gas wells there?

A. Yes, I drilled in the '20's, and perhaps some of those wells even after 1930; most of them in the '20's. I have forgotten now, I think it is 13 or 15 wells with a production [22] of somewhere between 150 and 200 million feet, cubic feet per day.

Q. Where were the wells with reference to Unit 5?

A. Most of them were in 5, and some of them were in Unit 4 and some in 6. The majority in Unit 4 and 5, mostly in 5.

Q. Did you have a market for your production?

A. No, I did not.

Q. What was the purpose of drilling these wells?

A. The idea, the original idea was to develop a sufficient amount of reserve that would justify the construction of a pipe line to some eastern markets.

Q. Were you active in trying to promote construction of a pipe line?

A. I was, very much so.

Q. Those wells you spoke of having drilled were drilled by you or by one of your companies?

(Testimony of John Wight.)

A. I think there was two drilled by me and the rest of them drilled by some of my companies.

Q. What was the total number of wells you drilled on that structure prior to 1930?

A. I am not sure whether it was—somewhere between 12 and 15; I am not just sure.

Q. Were most of those wells on Federal leases?

A. Yes, I believe they were all on Federal leases.

Q. Under those leases, you were required to pay rent whether [23] there was production or not?

A. That's right.

Q. Was anyone else drilling wells in the area at the same time, having reference to the time you were drilling these 12 or 15 wells?

A. There were quite a few wells drilled in the early part of 1920 by a large number of people. One of those was a fellow named—

Q. A little louder.

A. Quite a few wells drilled between 1915 and 1920, which I contributed part of the expense of drilling; some of those wells by a man by the name of John Johns. Most of the wells I definitely financed drilling were drilled between 1927 or 1928 and 1931 or 1932. About 1926, 1927 or 1928, Montana-Dakota Utilities or Minnesota Northern Power was drilling some wells in there.

Q. Montana-Dakota Utilities hadn't come into existence.

A. I think at that time they were designated as Minnesota Northern Power.

(Testimony of John Wight.)

Q. Was there some drilling by Cedar Creek Oil and Gas?

A. Yes, Cedar Creek Oil and Gas carried on some drilling, and a fellow named Rehnke and McDonald, and I helped finance part of the McDonald drilling.

Q. As a result of all of this drilling that occurred there during that period, was there a market developed for the gas? [24]

A. Yes, there was a market developed for some of the gas by Carbon Black Company. Later they closed down and moved out or was legislated out, I don't know which it was now. About that time, Northern Minnesota or Montana-Dakota Utilities built a pipe line; then there was a market available.

Q. Did you sell gas prior to the date of these unit agreements to Minnesota Northern?

A. No, I didn't.

Q. Was there production from their wells on the lands adjoining yours?

A. Yes.

Q. As a result of that were you required to pay compensatory royalties?

A. I was.

Q. What are those?

A. I don't know the amounts.

Q. Just explain to the Court?

A. Compensatory royalties is a royalty that the Government charged us, or charged me, I might say, for the gas that was being drained or depleted from Government leases which we held leases on, being depleted from wells on fee lands, or railroad lands,

(Testimony of John Wight.)

or lands in which the Government had no interest, so the Geological Survey would estimate the amount of drainage that was taking place from the producing wells on non-Government lands, and then they would assess a certain proportionate [25] amount of compensatory royalty based on the amount of gas they thought was being depleted from Government lands by adjacent wells on non-Government lands.

Q. What was the effect of that on your leases?

A. It made it very, very expensive and difficult to hold leases without a market.

Q. As a result of the situation that existed down there with the production and the necessity for paying lease rentals or compensatory royalties, what effort did you make to find a market for your gas?

A. I tried for many years to induce Minnesota Northern or Montana-Dakota Utilities to take our gas or transport it. They were legally a common carrier——

Mr. Lamey: We object to the statement of opinion, counsel, and ask it be stricken.

Court: It may be stricken; the objection is sustained.

Mr. Erickson: The purpose of this line of testimony—I will not pursue it much longer—is just to give you the background, and we are not leading to any other matter than the one here before us.

Court: That is fine.

Q. At any rate, you offered the gas for shipment to Minnesota Northern, and they didn't take it, is that correct?

(Testimony of John Wight.)

A. That's right, not until after the unit plans were agreed upon. [26]

Q. Now, as the result of your situation, did you enter into any negotiations with the predecessor companies of Montana-Dakota Utilities, looking to the sale of your gas? A. Yes.

Q. Tell the Court the circumstances under which those negotiations arose?

A. Do you refer now to the unit plans?

Q. Yes, to the unit plan.

A. Somewhere along about 1932, I believe it was, the Montana-Dakota Utilities, or Minnesota Northern Power, I think at that time it was—Montana-Dakota Utilities——

Q. Might it have been Gas Development?

A. Yes, Gas Development.

Q. Minnesota Northern, Gas Development, and M.D.U. are all the same? A. Yes.

Q. There were mergers effected and other things, is that correct?

A. Yes, correct. They submitted a unit plan of operation to unitize the Judith River sands reached at depths generally of 600 to 1,000 feet.

Q. Was there production from any other sand at that time?

A. There was some production, I believe, further south in the Eagle sand, which lies four to six hundred feet below the Judith River, but to my recollection, I don't believe there [27] was any in Unit 5 at that time.

Q. At the time you were discussing this Unit

(Testimony of John Wight.)

Plan with Montana-Dakota Utilities, or its predecessor companies, who were you representing?

A. I was representing, of course, myself; I was representing Capital Gas Corporation, Montana Eastern Pipe Line; I was representing 25 or 30 individuals with whom I had operating agreements or powers of attorney; also, I represented, to some extent, Cedar Creek Oil and Gas Company, and Mr. Jirik, and later on I represented W. B. Haney and H. C. Smith, but they weren't in the deal when negotiations really commenced.

Q. Where did the negotiations take place, Mr. Wight? A. Mostly in Billings, Montana.

Q. Who was there representing Montana-Dakota Utilities?

A. Alger Syme on one or two occasions; Raymond Hildebrand was there, I think, two different times, and Cecil Smith. I don't believe Mr. Heskett attended those meetings, although he may have attended one, and I think, as I recall now, on some occasions, one or two other officials of Montana-Dakota Utilities were present at some of those meetings.

Q. Was an instrument prepared that ultimately became a contract for unit operation?

A. There was.

Q. Will you explain the circumstances under which that instrument was drafted? [28]

A. Well, originally, the Gas Development Company or M.D.U. submitted me a copy. It was printed in counterparts, and they submitted me a

(Testimony of John Wight.)

copy and wanted to know if I could approve of it. I couldn't approve of it because there were so many terms and conditions in there I didn't like. I believe at that time they told me they had already received tentative approval from the United States Geological Survey. When I refused to approve of it, we got together at several meetings and we ironed out some of the difficulties. They did make some concessions, did make some modifications of the contract.

Q. When the contract was put in final form, who did that?

A. The Gas Development Company or Montana-Dakota Utilities.

Q. Now, you speak of certain concessions. I believe the original unit plan, which now appears as Defendants' Exhibit 3, limited the term for your participation in the unit agreement, is that correct?

A. I think three years or something; I believe five years on some, mostly three to five years.

Q. What was the purpose of the limitation of the term?

A. Because at that time I was trying to compel Montana-Dakota Utilities to file common carrier tariffs so I could transport my gas and sell it to my customers direct. I realized if I could do that, I could make many, many times more than I could out of joining the unit plan. In fact, the unit plan, even as signed, I didn't believe was profitable or would [29] earn us anything, but I had no alternative, and I did sign.

(Testimony of John Wight.)

Q. But subsequently that three year and five year provision didn't become operative, did it?

A. No, it took me 15 years to win the right to transport gas.

Q. That was long after the making of this agreement?
A. That's right.

Q. Now, in connection with the unit plan, were there other contracts negotiated?

A. Yes, attached to the unit plan and considered a part of the unit plan was the gas purchase contract to purchase the gas from the unitized Judith River sands.

Q. You are aware that that is the instrument that has been introduced here as Defendants' Exhibit 4, are you not, Mr. Wight?

A. Yes, that is the gas purchase contract that goes with the—it is really a part of the unit plan. Then, at the same time, there was another contract submitted to me called the deep test contract. That was the contract with the Fidelity Gas Company for all zones lower than 2,000 feet.

Q. That has been introduced as Exhibit 2. You are familiar with that as Exhibit 2?

A. That's right.

Q. Was that contract negotiated simultaneously with the others? [30]

A. The deep test or Fidelity contract was submitted to me about the same time, and they wanted, or they asked me to approve of it or disapprove of it because they wanted the three instruments dove-

(Testimony of John Wight.)

tailed together, wanted them to be executed approximately at the same time.

Q. In executing the instrument, Exhibit 2, you executed it on behalf of a number of different people, did you not? A. Yes.

Q. For whom did you execute it?

A. For the Capital Gas Corporation and for the Montana Eastern, and I don't remember now if I executed it as attorney-in-fact for any of the individuals, or if I merely took the agreements and had them executed. I believe in most cases I took the agreements and had each individual execute them.

Q. You are familiar with the history of that area, as indicated by your testimony, and as to the property now owned or claimed by H. C. Smith and W. B. Haney, can you tell me who executed the operating agreement as the then owners?

A. I executed some of them; some of that land at that time was under an operating agreement to either Montana Eastern Pipe Line or to Capital Gas, or to various Government lessees from whom I held powers of attorney and operating agreements.

Q. Now, the defendants have alleges, and the pleading indicates that as to the people involved here as plaintiffs, either they themselves, or their predecessors in interest, executed [31] this Fidelity agreement, is that your recollection of the fact?

A. Yes. I don't know whether Mr. Haney or Mr. Smith later executed supplemental or some other agreement, but originally those were executed either by me for and on behalf of one of the companies, or

(Testimony of John Wight.)

I had the party sign whom I represented as attorney-in-fact.

Court: Pardon me, I think we will take a five minute recess.

(5-minute recess.)

Mr. Erickson: I have difficulty realizing, your Honor, when you say five minutes, you mean it.

Court: I said five; actually I gave you a couple extra minutes. I think I said five.

Mr. Erickson: The facilities down the hall are a little crowded.

Court: Well, we will make it 10 the next time.

Mr. Erickson: May we have the last question, please.

(Last question and answer read back by reporter.)

Q. Mr. Wight, you made a statement before the recess that you had looked after the interests of Cedar Creek, W. B. Haney, H. C. Smith and others. Did you mean by that statement that you were their agent or are their agent?

A. No, I have never been their agent; I merely had a verbal understanding with them that as long as I was on the ground [32] and knew more about the situation than they did, they would like to have me sort of watch everything for them and advise them as to what should be done, and just more or less to sort of look after their interest.

Q. But, you had no power of attorney or no agency, is that correct?

A. No, I haven't, or never have had any power

(Testimony of John Wight.)

of attorney or agency from Cedar Creek or Smith to represent them as agent.

Q. The people actually interested in the Cedar Creek Oil and Gas are Tom Jirik and George Seiv-
ers, is that correct? A. That's right.

Q. They are not residents of Montana, are they?
A. No.

Q. H. C. Smith and W. B. Haney reside in Cali-
fornia, is that correct? A. That's right.

Q Calling your attention to Exhibit 2, which
is the Operating Agreement, can you tell me under
what circumstances that agreement was executed?

A. Well, as I stated before, that was submitted
to me at the same time that the unit agreement
and gas purchase contract were submitted, and I
know that the officials and attorneys for M.D.U. or
Gas Development Company wanted them all exe-
cuted more or less together. I remember I was
successful [33] in getting quite a few changes made
in the unit agreement, but it seems to me the only
concession I was able to get in the deep test agree-
ment exhibit was that they agreed to drill a second
well in Unit 5. I think, however, that was a verbal
promise instead of any written agreement.

Q. Did you have any part in drafting that
agreement? A. No, I didn't.

Q. I note that the original agreement in each
case is printed. Do you know who had that done?

A. No, I don't.

Q. But when you saw the printed agreement, it
was presented to you by whom?

(Testimony of John Wight.)

A. I believe it was mailed to me by Alger Syme.

Q. Who is Alger Syme?

A. He was one of the attorneys for the Montana-Dakota Utilities or Gas Development Company.

Court: Pardon me, when he says that he was successful in having changes made in the unit agreement——

Witness: The original agreement as submitted.

Court: The original agreement as submitted was not a printed form, is that it?

Witness: Yes, it was printed, but they reprinted it before it was finally signed.

Court: Very well.

Q. (By Mr. Erickson): Also was the original operating agreement [34] presented to you in printed form? A. Yes.

Q. Did you ever see it in any other form?

A. No.

Q. You say you were unsuccessful in getting changes made in the operating agreement, is that right?

A. It is my recollection I wasn't successful in getting changes made in the deep test or operating agreement, but I know I was in connection with the unit agreement.

Q. Can you say, Mr. Wight, whether the operating agreement might have been prepared by Cedar Creek Oil and Gas?

A. Not to my knowledge; they had nothing to do with it.

(Testimony of John Wight.)

Q. And so far as—well, do you know whether it is a fact that that agreement was prepared by Fidelity Gas or its attorneys?

A. Yes, definitely; it was either mailed to me or handed to me by some of the officials or attorneys for the Fidelity Gas or M.D.U.

Q. Do you know whether Alger Syme is still living? A. I understand he is not living.

Q. Did you examine the operating agreement prior to the time you signed it? A. I did.

Q. And at the time you signed this operating agreement, exhibit 2, some time in—— [35]

A. That was 1934.

Q. You say sometime in 1934?

A. I think that is when I signed it.

Q. I note from Exhibit 2, and the date isn't particularly material, I notice it was signed by Cedar Creek Oil and Gas in February, 1935. Would you say you had signed it prior to the time they signed? A. I think I did.

Q. You had been in the oil and gas business for sometime, is that correct? A. That's right.

Q. In going through the agreement, Mr. Wight, there is no provision apparently made for the length of time the agreement is to run. Do you know anything about that?

A. I know that is one of the matters that was discussed. It is also my recollection they wouldn't change it, so finally I had to sign it the way it was.

Q. Was there any discussion of Paragraph 4?

(Testimony of John Wight.)

A. We discussed the entire contract. I know there was a lot of——

Mr. Lamey: May it please the Court, we would like to have counsel fix the time and place for the discussion and then see if I have any objection.

Q. Yes. At the time you were negotiating the agreement which is exhibit 2, can you say where the discussion took place? [36]

A. It is my recollection we had two discussions in Billings, and it seems to me that before I signed them I also had one or two discussions in their office in Minneapolis.

Q. Can you say who was present when the discussions were held, with reference to the Billings discussions first?

A. In Billings, I would say the attorney was here, Ray Hildebrand or Alger Syme would be their attorneys; I think Cecil Smith or Mr. Gamble was there at one or two of the meetings.

Q. What about the meetings in Minneapolis?

A. At the meetings in Minneapolis, I think that was mostly in Mr. Syme's office, although it is my recollection at that time I also discussed the matter with Cecil Smith and Mr. Gamble, but I am quite sure most of that was with Mr. Syme.

Q. Those discussions took place just prior to the time the contract was executed?

A. I don't know just how much prior, but I would say immediately prior, yes.

Q. Now, with reference to the discussion at Billings, which I take it you recall to have been

(Testimony of John Wight.)

the first discussion, was there any discussions of Paragraph 4 of the contract, and I hand you Defendants' Exhibit 2?

Mr. Lamey: I would like to have that answered yes or no so I may make objection to further questions.

Q. Answer the question yes or no. A. Yes.

Q. What was the discussion?

Mr. Lamey: We object to that as incompetent, irrelevant and immaterial; the agreement subsequent to that discussion was reduced to writing, signed by the parties, and it speaks for itself.

Mr. Erickson: That, of course, is one of the vital points in this matter. It is our view that since the contract was prepared by the defendants, and since the contract is ambiguous, we should be entitled to explain the circumstances under which the contract was made.

Court: Well, I suppose what was said generally—that contract, having been prepared by one party is subject to being construed strictly against that party. Does that contemplate a conversation such as this where there were negotiations and he had changes made and that sort of thing?

Mr. Erickson: In the case of the Fidelity agreement, he was unsuccessful in getting changes.

Court: Yes, but he was negotiating on it. Isn't that a different situation than where A comes in with a contract and says, "Sign it here," and I sign it? Then, further, I don't see how you can vary the terms and conditions.

(Testimony of John Wight.)

Mr. Erickson: I don't believe we are trying to vary the terms. It is part of our argument, and I believe we may state it since no jury is here, it is our view that by Paragraph 4 they were required to drill a new test well within from 12 to [38] 18 months and——

Court: Won't that be a conclusion the Court will have to draw from a construction of the whole contract? I'll sustain the objection. In your prior statement, and in your brief, too, I believe you do refer to the fact that this was an agreement prepared by the defendants, and that it must be construed strictly against them. When the time comes, I wish you would look into this aspect of it: that while it may have been actually typewritten or printed, whatever form it is in, while that may have been done by one party, when the contract is actually discussed and negotiated, whether the same rule applies. I don't know. It occurs to me maybe the rule might be different.

Mr. Erickson: So far as the Court's ruling is concerned, it doesn't embarrass us because the purpose of the examination was limited primarily to calling the Court's attention to the paragraph, and we are not hurt by the ruling.

Court: That is fine. If there is any serious question about it, I would prefer, of course, to just reserve ruling and let you go ahead and put it in. I don't see it.

Mr. Erickson: We will give it further thought

(Testimony of John Wight.)

during the recess. If we feel it is important, we will make an offer of proof.

Court: Very well.

Q. Now, subsequent to the execution of this Defendants' [39] Exhibit 2, do you know what, if anything, was done by Fidelity Gas in the way of drilling on the Cedar Creek Anticline?

A. Yes, they drilled a well down in the south end of the field in accordance with the agreement, and then after that well was completed as a small producer, they did drill another well up in Unit 5 where we are interested, and that likewise was drilled in accordance with the agreement.

Q. Just by way of further introduction here, prior to the time of the drilling by Fidelity Gas of the N.P. Number 1 well, which is, I believe, the one designated as the first well, isn't it, Mr. Wight?

A. I think so.

Q. And according to the map, which is Exhibit 1-A, and I would like to have counsel be sure I am correct on this, the Number 1 Northern Pacific well was drilled in Unit 8-B at a point designated as "MDU NP No. 1," is that correct, Mr. Johnson?

Mr. Johnson: That is correct.

Q. Now, while Mr. Johnson is here, calling your attention to the second well, I believe that well is known as the Warren Well, isn't that correct?

A. That is my understanding.

Q. That is on acreage now controlled by Cedar Creek Oil and Gas?

A. That is correct; that is Unit 5. [40]

(Testimony of John Wight.)

Q. I believe in Unit 5 there is a well marked "MDU Warren No. 1" in Section 23, in the southwest quarter. You would say that is the location of that well? A. That's right.

Q. While the Warren well was being drilled, I believe the Smith well was also being drilled, which is also down in Unit 8-B—Mr. Smith, can you tell us where the Smith No. 1 was? May I call him to the map?

Court: Yes.

Q. By the map, Mr. Wight, it is indicated that the Smith well is marked "MDU" and is in Section 8 in Unit 8-B close to the N.P. Well, is that your recollection?

A. It is my recollection; I didn't know the exact location, but I know approximately.

Q. Did you know when the Warren well was drilled?

A. No, it was my recollection it was abandoned sometime in the early part of 1937.

Q. Do you know what the results of the drilling were on the Warren well?

A. They did not encounter commercial production.

Q. Were you yourself down there while the drilling took place? A. Just once.

Q. How far along was the drilling at that time?

A. It was just shortly before they were getting ready to [41] abandon it.

Mr. Erickson: May we have a few minutes?

Court: Do you want to take a short recess?

(Testimony of John Wight.)

Mr. Erickson: Maybe. This is an important stipulation and it might save us some time.

Court: Very well, Court will stand in recess until 20 minutes of 12.

(10-minute recess.)

Mr. Erickson: In view of the questions asked by the Court on this matter of negotiations, or the indicated view, I want to be sure the record is clear as to what happened on the Fidelity negotiations. I would like to ask one or two questions along that line.

Court: Very well.

Q. When you signed the Fidelity agreement, you said there had been a considerable amount of discussion with representatives of Montana-Dakota Utilities Company, is that correct?

A. That's right.

Q. As a result of those discussions, were any changes made in the original printed operating agreement offered to you?

A. None that I recall.

Court: We were discussing the unit agreement at the time the question arose.

Mr. Erickson: No, it was the operating agreement we were discussing at that time. As to the unit agreement, I believe [42] his testimony was there were some changes made in the unit agreement, but none in the operating agreement.

A. As far as I can recall, none.

Q. As to the gas purchase agreements, what was the situation with respect to them?

(Testimony of John Wight.)

A. There may have been some changes made, but I am not sure of them.

Mr. Erickson: At this time the plaintiffs would like the record to show that we agree that the well N. P. No. 1, the Smith well, and the Warren well, which is the one on Unit 5 lands, were drilled within the time provided in the operating agreement, which required that the test wells referred to, or test well referred to in Paragraph 3 be drilled within one year after the completion of certain agreements with certain other owners in the lower areas, down in Unit 8-A and 8-B.

Court: Very well.

Mr. Lamey: I think that may be agreed. Counsel spoke about the N. P. No. 1 Smith well.

Mr. Erickson: They are two separate wells.

Court: Yes.

Mr. Erickson: N. P. No. 1, Smith, and Warren.

Court: Smith is near N. P., and Warren is up in 5.

Mr. Erickson: We want the record clear we are not here contending that they failed to carry out the drilling operations contained in Paragraph 3 and related paragraphs of the [43] agreement.

Court: Very well.

Mr. Lamey: It is so understood.

Q. Mr. Wight, do you know the depth to which the Warren well was drilled?

A. Only what I have been told, and I think that was around 72 or 73 hundred feet.

Q. Now, at the time the Warren well was being

(Testimony of John Wight.)

drilled, and theretofore during the years of 1936 and 1937, did you receive reports of the results of the deep test drilling from Montana-Dakota Utilities Company? A. Yes, I did.

Q. How frequently did you receive such reports?

A. During the course of drilling, I think I received about three reports, perhaps three or four.

Q. You heretofore testified on a proceeding for the taking of your deposition, did you not, Mr. Wight? A. That's right.

Q. Now, I will show you a letter which will be introduced through another witness, but I would like to have it marked tentatively for identification as Plaintiffs' Exhibit 11, and ask you if you recall receiving a letter similar to this letter, which is directed to Mr. Jirik?

A. I wouldn't want to say that it was similar, but I did receive reports giving the progress of the drilling. [44]

Q. You have searched your files in preparation for this trial, have you not? A. That's right.

Q. You were unable to find in your files a letter similar to the one I showed you?

A. That's right.

Q. Would it be your impression you did receive a report of that nature dated sometime in 1935?

A. My recollection would be that I did.

Q. I now hand you Plaintiffs' Proposed Exhibit 12, and ask you if you have seen that before?

A. Yes, I have.

Q. That came from you files, did it not?

(Testimony of John Wight.)

A. That's right.

Q. It is dated? A. November 1, 1937.

Q. And this letter bears the signature of Cecil W. Smith, is that correct? A. That's right.

Q. What is the general nature of the letter, Mr. Wight?

A. It is the production runs on the N. P. No. 1 well for December, 1936, January, February, March, 1937, and for July, August, September, 1937, and also the Smith No. 1 well for May, June, July, August, September, 1937.

Mr. Erickson: At this time we offer Plaintiffs' Exhibit [45] 12.

Mr. Lamey: No objection.

Court: Admitted.

(Plaintiffs' Exhibit 12 admitted in evidence.)

Q. Do you recall receiving during the years 1936 and 1937 other letters from Montana-Dakota Utilities concerning the progress of the deep test drilling in the Cedar Creek field?

A. I recall receiving some during the course of drilling. That was in 1936. I am not sure I received any in 1937 in regards to the Warren well.

Q. Do you recall receiving any other letter in 1937 except Exhibit 12, which has to do with production in N. P. No. 1 and Smith?

A. No, I don't have any recollection of receiving any.

Q. Do you know when drilling ceased on Warren No. 1?

(Testimony of John Wight.)

A. In the inquiry I have recently made, I understand it was ceased in January, 1937.

Q. When did you first know, if you can recall, that the drilling had ceased in Warren No. 1?

A. I either read some article in one of the papers or was told that the well was going to be abandoned, possibly two or three weeks, or maybe it might have been a month before they actually abandoned it.

Q. On your deposition, you testified you thought you read an article in the Miles City Star or the Fallon County Times or [46] the Montana Oil and Gas Journal announcing the plan of the Montana-Dakota Utilities or Fidelity Gas to terminate drilling or abandon the Warren No. 1. Were you able to find such article?

A. No, I haven't; I have hunted, but haven't been able to find anything.

Q. What, if anything, did you do when you learned that Fidelity Gas was abandoning operations on the Warren well?

A. As soon as I was in a position to do so, I made a trip to Minneapolis to confer with officials of the Fidelity to see if I could induce them to go, to drill deeper.

Q. The head officials of both Montana-Dakota Utilities and Fidelity Gas, their office is in Minneapolis, is that true? A. That's right.

Q. And the officers of that company at that time, having reference now to 1937, were Mr. Heskett and Mr. Cecil Smith, is that your recollection?

A. Yes. My recollection is that the same offi-

(Testimony of John Wight.)

cials that controlled the Montana-Dakota Utilities also controlled the Fidelity.

Q. Do you know whether the offices of Fidelity Gas are in the same offices as Montana-Dakota Utilities? A. Yes.

Q. Do you know whether in 1937 Montana-Dakota Utilities existed as Montana-Dakota Utilities or Gas Development? [47]

A. I don't recall for sure.

Q. But, at any rate, Mr. Heskett and Mr. Smith were the principal officers of both corporations, is that true? A. That's right.

Q. Now, can you tell us when it was you made this trip to Minneapolis to confer with these two gentlemen?

A. In endeavoring to refresh my memory the best I could, I went down there in the early part of 1937 to Minneapolis, and I made another trip to Minneapolis a few months later.

Q. When you say "the early part of 1937," would you be able to tell us about what month that was?

A. No, I have no way of determining, except I know it was shortly after the well was abandoned.

Q. And your idea of when the well was abandoned was that it occurred sometime in January, 1937, is that correct?

A. That is the information that I have now, that it was abandoned sometime in January, 1937.

Q. When you went to Minneapolis, who did you there see connected with Fidelity Gas?

(Testimony of John Wight.)

A. To my recollection, the first man I talked to was Mr. Heskett.

Q. Where did you talk to Mr. Heskett?

A. At his office in their building in Minneapolis.

Q. Anyone else there present beside you and Mr. Heskett? A. Not that I recall. [48]

Q. Did your conversation have to do with the Warren well?

A. Yes, that is what I went down there definitely for was to discuss the possibility of them drilling the Warren well deeper.

Q. Tell us what that conversation was between you and Mr. Heskett?

A. I went down there to see them, if I could get them to go deeper because I thought there was a possibility of encountering oil at a greater depth. He told me definitely at that time they were through drilling for oil, had gotten their hands burned, so to speak, and the stockholders were complaining about spending so much money; they were definitely through drilling for oil, not going to do any more development as far as oil was concerned; they were going to stick to drilling for gas.

Q. Was that conversation with reference to the Cedar Creek Anticline?

A. With reference to the Cedar Creek Anticline.

Q. Did it have reference to the Exhibit 2, the operating agreement?

A. It applied to lands included in Exhibit 2.

Q. Any further discussion between you and Mr. Heskett at that first conversation?

(Testimony of John Wight.)

A. I spent about a week there on that trip. I had two or three visits with Mr. Heskett. It is my recollection I also [49] talked to Mr. Smith about the matter, but mostly with Heskett.

Q. You say you talked to Mr. Smith, or to Mr. Heskett about deepening the Warren well. Were any arrangements made?

A. No, he said as far as he was concerned, he was through with it. However, he told me if I wanted to do something with it, I could do something with it. I wanted to work out some kind of an arrangement.

Q. Go ahead.

A. He told me, as I stated a minute ago, definitely they were through drilling for oil, but I was free to do whatever I wanted to do; if I had some proposition whereby they could get the well drilled deeper, they would be willing to listen to it, but as far as they were concerned, they were definitely through with any more oil wells.

Q. You saw Mr. Cecil Smith?

A. He wasn't at the meeting with Mr. Heskett. It is my recollection I also discussed the matter with him. As long as I wasn't getting any place with Heskett, I thought I might accomplish something with him.

Q. It was your purpose to induce them to drill the Warren well deeper?

A. That's right.

Q. Did you do anything to try to get the well drilled deeper?

A. Yes, shortly I went to Washington, D. C.

(Testimony of John Wight.)

and New York to [50] confer with people I had previously had negotiations with that claimed to have money for drilling purposes; then I came back to Minneapolis and then to Denver.

Q. Were you successful in raising money to deepen the well?

A. No. I devoted a good deal of time for about a year hoping I could find some method or arrange to get the money to drill the well deeper.

Q. Did you apprise Mr. Heskett or Mr. Smith of your efforts to raise money?

A. I don't recall, except in my original discussion to see what I was going to do. I don't believe they told me whether the well was in shape to drill deeper. It is my recollection they said the well would be in shape to drill deeper. I am not sure of that.

Q. Did you have further discussions with Mr. Heskett and Mr. Smith about the Warren No. 1 or any other wells?

A. Yes, as I say, I discussed the matter with them different times, I would say, for close to a year, on two or three trips.

Q. You mentioned an early trip and then a later trip. Can you tell us when the second trip was on which you discussed it with them.

A. I was in Minneapolis—I went through Minneapolis in August, 1937.

Q. How do you know you went through at that time?

A. Because I remember I stopped in Minneap-

(Testimony of John Wight.)

olis and then went [51] on down to Washington, D. C. I found a check I had given the Powhatan Hotel on August 13, 1937, so I recall definitely that trip. I stopped over in Minneapolis for several days and talked to Mr. Heskett on that trip.

Court: I think we will recess until two o'clock.

(Noon recess.)

Q. I believe, Mr. Wight, the last questions were addressed to the second trip you made to Minneapolis in which you say you had a discussion with Mr. Heskett and Mr. Smith, and I think you said that that conversation took place sometime in August, 1937, or thereabouts, is that correct?

A. That is correct.

Q. Where were those conversations held?

A. In the office of Mr. Heskett in Minneapolis.

Q. Who was present at the time of the discussion with Mr. Heskett, having reference to the first of any discussions you may have had on that second trip to Minneapolis?

A. I don't recall there was anyone in Mr. Heskett's office at the time I had various meetings with him, except himself, just the two of us.

Q. Now, with reference to the conversation you held later in the summer then, in 1937, in Mr. Heskett's office, with you and Mr. Heskett present, was there any discussion of this deep test proposition, either the contract or drilling?

A. Yes, that was the purpose of my going there was to discuss [52] further the possibility of deeper drilling or continuous drilling.

(Testimony of John Wight.)

Q. What was said in that conversation?

A. Mr. Heskett firmly restated the same as before, that they were definitely through drilling for oil.

Q. Was the statement with reference to Unit 5?

A. That was drilling for oil anywhere in the Cedar Creek field, Unit 5 or any other part of the field.

Q. At that time, there was some oil production, I believe, down in the N. P. No. 1, or perhaps the Smith, or both of them. Was there any discussion about that at that time?

A. The discussions applied to only what he called test wells; those discussions only applied to any further exploratory work or what we call wild-cat drilling. It had no reference to drilling offset wells to the producers in the south end.

Q. With relation to the lands covered in this lawsuit, were they singled out for special consideration in that discussion between you and Mr. Heskett or not?

A. Our discussions centered mostly around the Warren well, drilling that well deeper, or drilling another well in that same unit.

Q. What did Mr. Heskett say, if anything, about whether they would or not do any more test drilling?

A. He said definitely they were through and wouldn't do any more test drilling for oil. [53]

Q. Have you given us all the conversation you

(Testimony of John Wight.)

had with Mr. Heskett with reference to deep drilling or testing at that time?

A. The only conversation I have a firm recollection of is the fact he was through and I was unsuccessful in inducing them to drill deeper. That stands out very definitely. The other was there was a possibility if I could find someone to put up money that would drill the well deeper.

Q. At the time of your second visit with Mr. Heskett, had you already contacted the people you thought might put up the money to deepen the well?

A. I had.

Q. Do you know whether the Warren well in August, 1937, still had casing in it so it could have been drilled deeper?

A. I didn't check on that because of not having any success in locating someone who would drill deeper. I thought if I was successful, I could determine whether or not the well could be drilled deeper and what sort of a deal we could make for them to take over the casing in the well.

Q. In your trip in August, 1937, or thereabouts, besides your discussion with Mr. Heskett in his office, did you have any further conversation with him with relation to this deep test?

A. All my conversations with Mr. Heskett and also with Mr. Smith and Mr. Syme and all the officials I had discussions [54] on the matter with from shortly after the well, or about the time I had word it was going to be plugged or abandoned, for

(Testimony of John Wight.)

the following nine months or a year, centered around my efforts to induce them to drill the Warren well deeper, or if I was successful, to work out a deal to carry it on deeper.

Q. On your second trip to Minneapolis, did you have any discussions with Mr. Cecil Smith about this?

A. It is my recollection—I know most of my conversations in that respect were with Mr. Heskett. As I stated awhile ago, I still recall having some conversations with Cecil Smith, but I don't recall the details now, excepting they were along the same line.

Q. To sum up the conversations, the conversations you have spoken of, were they all to the same effect, that they were through with deep drilling?

A. Cecil Smith told me definitely they were through with any further exploratory work for oil; Mr. Heskett told me that and Mr. Syme told me that.

Q. After your second visit to Minneapolis in 1937, you indicated there might have been other conversations in the eight or nine month period in 1937. Were there any further discussions between you and Mr. Heskett, Mr. Smith, or Mr. Syme, or any other official of Montana-Dakota Utilities Company or Fidelity Gas Company on the deep drilling, deep testing?

A. No, nothing I can say, except as I say, they told me [55] firmly and definitely they were through with drilling any further exploratory oil wells,

(Testimony of John Wight.)

and as far as I was concerned, I was free to do what I wanted to with the oil rights.

Q. At that time you had some acreage yourself, did you? A. I had some acreage myself.

Q. You were an officer of Capital Gas?

A. And Montana Eastern.

Q. And Montana Eastern?

A. Yes. I still had an interest in the Atlantic Pacific acreage.

Q. Had Susan Wight acquired any of her interests at that time?

A. I think so, I am not sure.

Q. In 1938, did you have any conversation with any of these officials concerning the deep test?

A. It is my recollection I was down there in 1938, and I did discuss it with them with the idea of hoping they might have changed their mind and might have decided to go ahead and drill another well. I didn't have a long conversation with them at that time. They told me they were definitely through and their decision not to do any more exploratory work in that field still stood.

Q. Do you know whether they drilled any more wells in the Cedar Creek Anticline, that is, Fidelity Gas, from the year 1937 on? [56]

A. I don't think they did, as far as any information I had, they hadn't drilled any more wells.

Q. Were you keeping in touch with the field?

A. In a general way, yes.

Q. You retained some interest there?

A. Sure, I was very naturally very much in-

(Testimony of John Wight.)

terested in wells drilling anywhere I had any interest.

Q. After the conversations to which you referred, did you yourself make any attempt to lease the properties that are involved here to anyone else for drilling below the 2,000 foot level?

A. Yes, I did.

Q. How extensive was that?

A. About every 12 or 14 or 15 months, I would send out a mimeograph letter to possibly 50 or 75 or 100 oil companies wherein I would state we had the oil rights covering quite a large amount of land in the Cedar Creek field and wanted to know if they were interested, and if they were, we would send them maps, reports and data. I didn't have any success in any inquiries I sent out.

Q. Did your listing include lands other than your own in the unit?

A. Yes, Cedar Creek's, the Haney and Smith lands——

Mr. Lamey: We object, may it please the Court, as not the best evidence. He is testifying, as I understand, to [57] some instrument, letter or document he sent out.

Court: Sustained.

Q. Do you have in your possession, Mr. Wight, any of the letters, the lists that you sent out to people whom you tried to interest in this?

A. Yes.

Q. Interest in drilling in these deeper sands?

A. Yes.

(Testimony of John Wight.)

Q. Do you have any of those with you?

A. I had six or eight copies of the last mimeographed letter I sent out to the various oil companies.

Q. Do you have any explanation of why you don't have copies of the letters you sent out yearly other than to which you have referred?

A. We were so short of filing space several years ago we had to clean out most of our old files and destroy those we thought were no good. Those we thought might be some good in the future, we stored them in the attic of my former residence.

Q. Have you made an effort to find copies of those letters at my request?

A. I have.

Q. Have you been successful?

A. No.

Q. You made reference to one letter, which has been marked [58] for identification as Plaintiffs' Proposed Exhibit 13——

Court: While I think of it, I observe that a number of attorneys don't have any space at the counsel table. Mr. Harrington, will you get in touch with the Postmaster or whoever is in charge of furniture around here and ask him to supply another table in here this evening so that tomorrow——

Mr. Erickson: May I make a comment off the record?

Court: Yes.

(Off the record discussion.)

Q. Handing you Plaintiffs' Proposed Exhibit 13, will you tell us what that is?

(Testimony of John Wight.)

A. This is the last mimeographed copy of letter I sent out to perhaps 75 or 100 different oil companies.

Q. It bears no date.

A. The only way I could identify this was that I refer here to the Government auction sale. The only way I could identify the approximate date of this is because I referred to a sale being made by the Government on some lands in November, 1952, so I know the letter was sent out shortly after that.

Q. Do you have any copy of one of those letters showing a date and to whom it was addressed in your files?

A. It seems to me we did receive a few inquiries——

Q. No, I mean copies of this letter showing to whom it might have been sent?

A. I am not sure; it seemed to me I had, but I am not sure [59] about it.

Q. I asked you to find the letters you might have sent out. You produced this. Was there anything else you could find?

A. I think I found one or two inquiries or answers to that letter, but I wasn't sure I could identify that those letters were in answer to this particular letter.

Q. You see, this is a mimeographed letter, and you sent out this form of letter?

A. That's right.

Q. And this letter, with the exception of the

(Testimony of John Wight.)

address, it was, you said, sent to from 75 to 100——

A. I sent out at least 75 and perhaps as many as 100.

Mr. Erickson: I would like to now offer Plaintiffs' Proposed Exhibit 13.

Mr. Lamey: You now offer that in evidence?

Mr. Erickson: Yes.

Mr. Lamey: We object to it as incompetent, irrelevant and immaterial; it proves no issue in this case; there is no showing it was sent to any of the defendants and that they would be bound by it.

Court: Sustained.

Mr. Erickson: The offer is made, may it please the Court, to show that Mr. Wight made offers to somebody else. It doesn't have any effect on the defendants, because it was not addressed to them.

Court: It is not competent in any event. If that letter was sent to anyone, you should have subpoenaed the people to whom it was sent; in other words, the copy is not admissible in evidence until you have explained the absence of the original.

Q. Mr. Wight, did you discuss orally with representatives of oil companies the leasing of the deep sands after 1938? A. Yes.

Q. On more than one occasion?

A. Many, many occasions.

Q. Included in those with whom you had conversations concerning the leasing of these deeper sands, was the Shell Oil Company included?

A. Absolutely, they were.

Q. When did you first discuss the leasing of the

(Testimony of John Wight.)

deeper sands with any agent or representative of the Shell Oil Company?

A. One of the agents or representatives of the Shell Oil Company came in to my office to see me in answer to this mimeographed copy of this letter I had sent to them.

Q. Who was that?

A. I am not absolutely sure. I think it was Mr. Gadbois. There were two different men representing the Land and Leasing Department of the Shell Oil Company was in to see me. One of them, I am sure, was Mr. Gadbois. I forget the other man's [61] name.

Q. About when was that?

A. I have no way of placing the exact date with the exception it was a short time after I sent this letter out, and I would say it was some time in the last part, or sometime in 1952, perhaps in the last half.

Q. Did you, at that time, offer to lease to the Shell Oil Company or turn over to them these rights to drill in the deeper sands?

A. I did; they were very much interested.

Q. There was a discussion with Mr. Gadbois?

A. There was a discussion.

Q. With anyone else?

A. With two men, Mr. Gadbois and another, I don't remember his name, but it was with one of the men representing the Land and Lease Department of Shell Oil Company.

Q. How long did those discussions take?

(Testimony of John Wight.)

A. One discussion, I guess, perhaps three or four hours, and two or three discussions, perhaps, lesser time.

Q. How long a period of time did those discussions take?

A. The first discussion was when they said they were interested and wanted to check into it; the last discussion, perhaps several months after that, when they came through and told me——

Q. Wait a minute, now. When did these discussions terminate? [62]

A. I think it was in late 1952, as I recall now; I am not absolutely sure of the date. They terminated when they found out Montana-Dakota Utilities owned those oil rights and we didn't.

Mr. Erickson: Would you read the last answer?

(Answer read back by Reporter.)

A. That is the statement they made.

Q. Did you know between 1938, or the last part of 1937, until the date on which this statement was made to you by Mr. Gadbois that Montana-Dakota Utilities or Fidelity Gas was claiming any interest in the deep sands?

A. Never knew a thing about it; had no idea they were claiming an interest in the oil rights.

Mr. Lamey: Please read the last question and answer?

(Question and answer read back by Reporter.)

Q. And you were continuously, from 1937 up until that date, interested in these properties, or

(Testimony of John Wight.)

some of them, covered by the deep test agreement, were you not?

A. As I said before, every 10 or 12 months, or somewhere about that time, I would send out mimeographed letters to various oil companies seeing if I could interest them.

Q. Mr. Wight, there was an objection sustained, and what I am asking about is this: Were you keeping in close touch with the lands in this Unit 5 during the period from 1938 on through 1952?

A. Yes, I was.

Q. You were actively engaged in looking after the interests of Susan Wight, were you not?

A. I had other interests, International Trust, as I say; most of the time, or for awhile, I had an interest in the Capital Gas, and some other holdings there until I finally lost those.

Q. During the period from 1938 through 1952, were you in correspondence with Montana-Dakota Utilities generally on the matter of gas production and so forth in the field?

A. Yes, I had some correspondence pertaining to the various phases of the unit plan or gas development.

Q. I now show you, Mr. Wight, Plaintiffs' Proposed Exhibit 14, which is a letter dated April 27, 1951, and addressed to Mondakota Gas Company. Who is Mondakota Gas Company?

A. That is a company I am now president of.

Q. You have been interested in Mondakota Gas Company over the years?

A. I have.

(Testimony of John Wight.)

Q. They have held leases and interests in the Unit 5 area, have they not?

A. Yes, they had some interest in Unit 5.

Q. That letter bears what appears to be the signature of Cecil M. Smith. Where did you receive that letter?

A. It was either handed to me or mailed [64] to me, perhaps—that letter was either handed or mailed to me, perhaps a year or a little longer than the date of it.

Q. And the date is April 27, 1951?

A. That's right.

Mr. Erickson: I now offer Plaintiffs' Exhibit 14.

Mr. Lamey: No objection.

Court: Admitted.

(Plaintiffs' Exhibit 14 admitted in evidence.)

A. I might say I don't think that is Cecil Smith's signature.

Q. Do you have any explanation why you didn't secure a copy of this letter until a period of time considerably after it was dated?

A. That was addressed to the former office of the auditor for Mondakota Gas Company in California, and most of those letters were in custody of some of the other officials of the company.

Q. Had you seen any other copy of this letter addressed to any other of the plaintiffs or anybody else prior to the time you saw this one?

A. I think I saw one addressed to Susan M. Wight about the same time, or it might have been before that.

(Testimony of John Wight.)

Q. You mean about the same time you saw this one, or the same time it is dated?

A. The same time I saw this one, approximately the same time. [65]

Q. Do you recall, Mr. Wight, whether your conversation with Mr. Gadbois in which he told you Montana-Dakota Utilities claimed to be owner of these deep sand rights occurred before or after you saw this letter? A. Before I saw the letter.

Q. So, you had the conversation with Mr. Gadbois as the first notice you had after 1938 that Montana-Dakota Utilities or Fidelity Gas was claiming rights in the deep sands, is that correct?

A. That is my recollection, that the first information I had that Fidelity Gas claimed the deep rights was when I got the information through Gadbois.

Q. Would you say whether or not the letter, Exhibit 14, is the first formalized statement you have seen by Montana-Dakota Utilities or Fidelity Gas to the effect they were claiming those interests after 1938?

A. Either this letter, Exhibit 14, or a similar one addressed to Susan M. Wight.

Q. But it would be the same letter?

A. The same type of letter.

Q. You testified this morning that during the period of time in which drilling was going forward, ending with the letter of November, 1937, which I believe is Exhibit 12, you had received yourself, or others whom you were, whose interests you were

(Testimony of John Wight.)

looking after, a number of reports from [66] Fidelity Gas on the operations for deep testing, is that correct?

A. I did receive a number of letters during the period they were actively drilling.

Q. Did you receive any report after the letter of November, which is Exhibit 12, November, 1937, from Fidelity Gas of any nature?

A. I can answer it this way, that after they abandoned the well, to my knowledge I never received any correspondence from the Fidelity Gas with reference to that well or any other drilling for oil or carrying on any operation pertaining to oil up until I saw these letters.

Q. Of April, 1951, is that correct?

A. That's right.

Q. During all of the period that has been covered, were you looking after Susan Wight's properties here? A. Yes.

Q. Were you taking care of the detail of correspondence?

A. I was taking care of all the details.

Q. There was production of gas from the Judith Sands on her properties during these years, was there not? A. Correct.

Q. Reports were made and checks were received from Montana-Dakota Utilities?

A. That's right.

Q. Were those all handled by you? [67]

A. I wouldn't say all of them; any that required any attention was handled by me.

(Testimony of John Wight.)

Q. Is it a fair statement that during all the years you have looked after her interests in all of these properties for her? A. Absolutely.

Q. After you talked to Mr. Gadbois or he talked to you, and after you saw these letters, what, if anything, did you do in relation to these deep test agreements?

A. I arranged to have a notice sent out, not a cancellation notice, because I didn't think that it required a cancellation notice, but I arranged to have a notice sent out by all of what I would call my group notifying Fidelity Gas Company and M.D.U. that we did not recognize or consider as valid any rights they might have under the 1934 operating agreement or deep test agreement.

Q. You were served with a subpoena duces tecum, were you not, Mr. Wight, to produce certain instruments here? A. I was.

Q. Included in those instruments was a request that you produce a form of notice of cancellation directed to Montana-Dakota Utilities Company. It has now been marked as Plaintiffs' Exhibit 15, and it is entitled "Notice of Cancellation". Is that the form of the notice that you sent out to what you call your group in this matter? A. Yes, that is. [68]

Q. And do you know whether or not such a notice on this form was sent to the Montana-Dakota Utilities Company on behalf of Susan Wight?

A. Yes.

Q. Now, this notice of cancellation has to do

(Testimony of John Wight.)

with the cooperative or unit plan of development agreement, isn't that correct?

A. Yes, that is correct.

Q. I will ask you further about this—we now offer Plaintiffs' Exhibit 15.

Mr. Lamey: I would like to ask or have counsel ask the witness when this was sent. There is no date on it.

Q. Mr. Wight, do you know when this notice of cancellation was sent by Susan Wight to the Montana-Dakota Utilities Company?

A. No, I have no exact information, but I believe it was somewhere between six months and a year after these were originally prepared.

Q. Do you know when they were originally prepared?

A. I had these originally mineographed in 1949. It might have been even more than a year afterwards.

Mr. Erickson: I now offer Plaintiffs' Exhibit 15.

Mr. Lamey: No objection.

Court: It is admitted.

(Plaintiffs' Exhibit 15 admitted.) [69]

Q. Mr. Wight, during the period from the date the Fidelity agreement, the deep test agreement was executed to this date has Fidelity Gas paid any of the rentals or royalties that are to be paid under either the fee lease or the Government lease on the Susan Wight lands?

A. To my knowledge, I would say definitely not.

Q. Do you know whether they have or not?

(Testimony of John Wight.)

A. No, I have no way of knowing. The only way I would have of knowing is the statements that we received from the M.D.U. showing the deductions from the unit or rental payments showing that the unit owners are charged up with these rental payments.

Q. Now, how does that operate?

A. For instance, in Unit 5, M.D.U. sends out a statement every month showing the amount of gas taken out of the entire unit and the amount allocated to each unit owner. It shows also a statement as to what the unit expenses have been, so some months, or most of the months, there will be a statement that unit owner Susan M. Wight, or whoever it may be, are indebted to the M.D.U. for a certain amount of money.

Mr. Lamey: We object to this as not responsive, and it is incompetent, irrelevant and immaterial. I don't know what counsel is trying to show, that M.D.U. has or has not paid royalties under the Government leases. Perhaps we can stipulate on that. [70]

Court: I was going to say—it seems to me he said he doesn't know in the first place, that is his answer. It seems to me you ought to be able to get together on that.

Mr. Erickson: I am sure we can't. I believe the witness has shown, of course, he does know. The Court is familiar with the habit of a witness saying he doesn't know, and then going ahead and showing he does know. I want the record to show, and per-

(Testimony of John Wight.)

haps counsel agrees, that Fidelity Gas has never paid any rentals on these lands with its own money; rentals are paid with deductions from the royalties. If they will agree or stipulate on it, it is all right.

Mr. Lamey: As to that, these lands are divided 75 to the M.D.U. and Fidelity—I don't see how this can be an issue in this case anyway. That pertains only, as far as I can see, to the gas unit and maybe the gas purchase agreement.

Mr. Erickson: In the pleadings, defendants have set up they have expended large sums of their money in keeping alive their leases under the Fidelity Agreement, and the purpose of this line of testimony is to show they have paid no lease money under the Fidelity Agreement at all, and that anything that is paid is paid out of production on Unit 5, which is chargeable against the share of the land owner, so the land owner pays. That is the purpose of the testimony.

Court: Is that the fact? Can you agree on that?

Mr. Johnson: The fact is that the minimum [71] rentals have been paid by the company and have been recouped out of gas production.

Mr. Erickson: But that is not Fidelity.

Mr. Johnson: No rentals have been paid by these plaintiffs because rentals are minimum royalties on this particular acreage.

Court: Well, apparently you can't get together, you can't agree as to what was done, or what is done. I don't think he knows; he said he doesn't.

(Testimony of John Wight.)

He is talking about something he understands or has heard about.

Mr. Erickson: No. May I try to qualify the witness a little further, your Honor?

Court: Very well.

Q. You negotiated the Unit 5 agreement, is that correct? A. That's right.

Q. Over the years you have been agent for Susan M. Wight? A. That's right.

Q. You have handled all the details of her operations——

Court: Let me get this straight. I understood him to say he was never agent of any of these people.

Mr. Erickson: Not as to Susan Wight; he was agent as to Susan Wight, but not as to W. B. Haney, H. C. Smith or Cedar Creek Oil and Gas.

Court: Very well.

Q. Is that a correct statement? [72]

A. That is correct.

Q. Now, in handling her affairs, you have received the reports from the Montana-Dakota Utilities Company on the operations of the Unit 5 gas operation, have you not?

A. I do, every month.

Q. You examine those? A. I do.

Court: Of course, it may be the distinction between you is a distinction without any difference. Counsel has kind of said, "We pay them, and then recoup them from the earnings." Now, does that mean something particular to you, or aren't the

(Testimony of John Wight.)

payments taken from the earnings of the landlord under the agreement.

Mr. Johnson: They are paid in any event by Montana-Dakota Utilities, and under the unit plan, as production is realized, that is then an expense under the unit plan of operation.

Court: So it is the landlord's money that is paid?

Mr. Johnson: Yes.

Court: Does that satisfy the situation?

Mr. Erickson: I want to be sure the record is clear. When Mr. Jirik or someone else is on, I will present to him those statements for consideration.

Court: Fine.

Mr. Erickson: Perhaps counsel will stipulate Fidelity Gas has never paid them as such on any of these properties here [73] involved, is that a correct statement?

Mr. Lamey: That may be correct because there hasn't been production under them. You brought out there were three agreements here made together as sort of a basket deal. You are now talking about one phase of it, the unit agreement, under which royalties or rentals are adjusted. From that sense, they are paid through the unit plan and not under the Fidelity Agreement.

Mr. Erickson: I think that will be a matter for argument. I want the record to show Fidelity Gas as such has never paid them.

Court: Just as a matter of the way the trans-

(Testimony of John Wight.)

action was handled, Fidelity has not made payments.

Mr. Erickson: We think it goes further than that. It may be a matter for argument. So, we understand now that Fidelity as Fidelity has never paid any rents or royalties or money due under these leases.

Mr. Lamey: I don't know what issue that illustrates. In our suit on the Fidelity operating agreement, there is no issue on that. Our allegation is that we paid under all those agreements when we set them up in our estoppel. I can't see the significance of it.

Mr. Erickson: We believe it is tremendously significant.

Court: If you do, counsel, fine, go ahead with it, but I would suggest you are not going to prove it by this witness. [74] You had better prove it some other way. He is not going to be able to prove the point for you.

Q. Mr. Wight, do you know of your own knowledge in handling Susan Wight's interests here whether any payments have been made by Fidelity Gas as rental or in any other manner on any of the leases held by Susan Wight which are here covered? A. None whatsoever.

Q. Do you know they haven't?

A. I know they haven't as far as the statements are concerned.

Court: You are right back where you started, Judge. I think what you have to do is subpoena

(Testimony of John Wight.)

Fidelity Gas and get their records, make a demand for admissions on them. You are not going to prove it by this witness; you just can't do it.

Mr. Johnson: If the Court please, I would like to say I don't think there is any issue on this.

Court: I am not going to rule there isn't. The Judge thinks there is. I'll let him put the facts in. He thinks they are important. They can go in.

Mr. Erickson: Our position is that under the terms of the agreement, they agreed to keep up, keep these leases in good order and so on.

Court: Under the operating agreement?

Mr. Erickson: Under the operating agreement, that's right. [75]

Court: Then, you see, you have different theories. You see, you just say, "Well, it is not just the operating agreement, it is the unit agreement too that has to be considered." We can get all the facts and can decide whether it is Judge Erickson's theory or your theory that is correct, but because you have different theories, it doesn't mean he can't put the evidence in, but if he wants to put the evidence in, he can't do it with this witness. He doesn't know what Fidelity did or didn't do.

Mr. Erickson: There is an easy way; I think the parties can stipulate.

Court: Or, it is a little late in the game, but you might even make a demand for an admission as to what the situation is.

Mr. Erickson: I think we can work it out.

Mr. Lamey: I think so.

(Testimony of John Wight.)

Q. Do you know whether Susan Wight ever received any payment from Fidelity Gas under the deep test agreement? A. None whatsoever.

Q. Do you know whether International Trust ever got any payments of money from Fidelity Gas under the deep test agreement?

A. No, they did not.

Q. There was talk about the wells N.P. No. 1 and Smith where there was some production. Did Susan Wight ever receive any [76] payments out of production down there?

A. No, not out of oil production.

Q. That is what we are limiting it to.

A. Yes.

Q. She didn't receive any payments out of oil down in Unit 8-B, did she? A. No.

Mr. Erickson: I believe that is about the end of Mr. Wight's testimony. If we could have a few minutes recess to pull our notes together, we might have a little time.

Court: Very well, Court will stand in recess until three o'clock.

(10-minute recess.)

Q. Mr. Wight, calling your attention again to the circumstances at the time the operating agreement or deep test agreement was negotiated with Fidelity Gas, was there any discussion at the time as to what would happen in the event there was no success in the testing? A. Sure.

Q. What was the discussion?

Mr. Lamey: Wait. We object, may it please the

(Testimony of John Wight.)

Court, it is incompetent, irrelevant and immaterial; there is no issue in this case, no pleading to reform this agreement, and that the witness is now attempting to vary the terms of the written instrument by conversations that took place during [77] negotiations, no proper foundation laid.

Mr. Erickson: May I—this is somewhat along the line of the question asked this morning, your Honor, and so that the record will be clear, I might ask Mr. Wight one further question on that point, and that is whether that conversation related to the terms of the contract itself?

A. Sure it did.

Mr. Lamey: Same objection.

Court: Well, yes, I don't see—the terms of the contract govern. It is not going to make any difference.

Mr. Erickson: I will, of course, present this more fully, but the general rules as to the interpretation of contracts are contained in Chapter 13, 701 through 727 of the Montana Codes, and in that section appears the various provisions under which the circumstances of the contract may be explained, and also having particular reference to 13.720, that words should be taken most strongly against the person that supplied the words. I would like to make an offer of proof if the objection is sustained.

Court: Well, I don't think that this would go to that point. All you have to do to have the Court adopt that principle is to prove that this contract was the contract of the defendants.

(Testimony of John Wight.)

Mr. Erickson: I though I had done that.

Court: That is what I say, I am not saying [78] you haven't and so then the Court would construe the words used in the contract itself strictly against the defendants, if that is the fact.

Mr. Erickson: There is an added point, that we believe the contract on its face has an ambiguity in it that requires some explanation from somebody.

Court: I don't believe it has, and certainly you haven't alleged that. Now, if you are interested in it—I don't see—it may be you could amend your complaint and so allege, but I don't see that what this witness has to say about what that contract means is of any benefit to me. The words are in the contract here, and I am going to have to do that.

Mr. Erickson: It probably goes a little broader than that, the interpretation of the contract by the parties themselves.

Court: Is evidence of what they understood the contract to be.

Mr. Erickson: Yes.

Court: That is true, but that has to be put in issue first.

Mr. Erickson: I believe it is in issue under the general allegation of the complaint that the contract is terminated, and this goes to what terminates the contract.

Court: I just couldn't go along with you on that, I don't believe. I'll sustain the objection at this point. If you will look into it further before we finish this, I will be glad to reconsider.

(Testimony of John Wight.)

Mr. Erickson: I would like to make an offer of proof.

Court: Very well.

Mr. Erickson: The plaintiffs offer to prove through the witness on the stand that at the time the contract was negotiated, and during the discussions at the conference at Billings referred to by this witness, the question of the effect of unsuccessful testing or drilling program was discussed, and reference was made by one of the representatives of the Fidelity Gas Company to Paragraph 4 of the deep test agreement, and it was stated by the representative, and generally agreed that in the event the testing program was not successful, and in the event the testing program was terminated, that there would then be remaining in Fidelity Gas no rights under the contract, and that Section 4 was referred to as the section which had that effect.

Mr. Lamey: We object to that on the grounds heretofore stated.

Court: Very well, I'll sustain the objection.

Mr. Erickson: That is all.

Court: It seems to me, as I say—I don't want to foreclose you on this, and I would suggest that you maybe be of some assistance to me in presenting something to me to let me open this again if [80] I am wrong, but it seems to me if you want to reform a contract, you have to make proper allegations to admit the evidence, or if the contract is ambiguous, you have to so allege, and if it is ambiguous and you so allege and you want to explain

(Testimony of John Wight.)

it, you can show how the parties themselves have interpreted it. Otherwise, even though the parties themselves misinterpret the contract, if the contract is on its face plain, the Court is, so to speak, "stuck" with the contract. That is how I would look at it. I would ask you to present something to me to change that position I have taken.

Mr. Erickson: Briefly it is our view we are not seeking to reform the contract or vary its terms. It is a contract like many others, no matter what kind of a suit, the Court has got to find out what it means. The only purpose of this line of testimony is to show what the contract means, not to vary the terms or make different terms or anything else. That is the theory under which we would offer it.

Court: If you are not going to vary it or make it any different, then it is what the Court would find anyway. It seems to me it is going to be something so plain we are right back where we started.

Mr. Lamey: It seems to me it is an offer to have this witness to assist the Court to say what the contract is.

The Court: Not that I don't need some assistance, the theory of the law to the contrary. Very well, proceed. [81]

Mr. Erickson: That is all I have of this witness.

Cross Examination

Q. (By Mr. Lamey): You testified a while ago with reference to a form that you say you sent out

(Testimony of John Wight.)

to a number of persons or oil companies in which you referred to some Government bidding in November, 1952, is that correct? A. That's right.

Q. Now, as I understand, it was perhaps in response to that that a Mr. Gadbois of Shell Oil Company came to you sometime later in 1952?

A. I am not absolutely certain it was from that form letter or one I sent out previous to that. I did receive some inquiries about that. I was more or less under the impression Gadbois came to me in response to that one; it may have been a previous one.

Q. You did testify Mr. Gadbois came to your office the latter part of 1952? A. 1951 or 1952.

Q. Just a few minutes ago, did I understand it correct that you said sometime after this letter, which you say was sent out after November, 1952, that Mr. Gadbois came to see you from Shell?

A. It was one of the letters I sent out. I sent [82] out several letters. I am not sure of the dates on that. I do know I had sent out several letters or mimeographs——

Q. Just a minute——

Mr. Erickson: May I make an objection? Since it is cross examination, the witness is entitled to explain his answers.

Court: Yes, he is entitled to explain his answer, but he should answer first.

Mr. Lamey: I want the question answered first, and he can explain it later if I don't give him the opportunity.

(Testimony of John Wight.)

Q. You saw Mr. Gadbois late in 1952, and he told you they had made a deal, is that it, with Fidelity for this acreage?

A. Yes, he said he had made some tentative deal with the M.D.U. on the acreage which included the acreage we had submitted to him, and he was satisfied in his mind that Montana-Dakota Utilities or Fidelity Gas Company had some claim on those oil rights, and, therefore, he was not going to deal with me.

Q. That was the first time you found out Shell had made a deal with Fidelity, is that right?

A. To my recollection—I can be wrong on those things, my memory could be hazy on some parts I didn't think was important, but I don't recall at this time of having any knowledge of the Montana-Dakota Utilities or Fidelity Gas Company claiming those oil rights until Mr. Gadbois told me that you [83] had laid some claim to them.

Q. And, to the best of your recollection, this was in 1952, late?

A. Well, I am not sure about the dates on that; as I say, I can't tell you whether it was 1951 or when it was. It was shortly after they had made the deal with M.D.U. for the lands. As far as the dates, I can't be positive on that.

Q. Would you say it was shortly after they made the deal?

A. It was shortly after they made the deal.

Q. Do I understand, then, that Mr. Gadbois

(Testimony of John Wight.)

saw you shortly after the deal was made between Shell and Fidelity?

A. No. So there won't be any misunderstanding, I said Mr. Gadbois first came in my office, apparently, before he had interviewed M.D.U., in answer to one of the circular letters we had sent out submitting these lands, either him or one of the other lease men of the Shell. They were in my office twice. Then, some several months afterwards, they came back, either Mr. Gadbois or the other man—I forget his name now—came back then and stated they had made some deal with M.D.U. for the lands, and he wasn't going to deal with me because he wasn't satisfied we owned the oil rights.

Q. When was that?

A. I don't know for sure.

Q. What year?

A. I can't tell you whether it was 1951 or 1952; [84] no use asking me, because I can't tell you.

Q. It is very important to us, Mr. Wight—

A. I know it is important; I can't pin it down. I have no way of doing it. I made no notes of it, so I can't pin it down.

Q. What is your best recollection of when you first saw Mr. Gadbois and he told you they had made a deal with Fidelity for these lands?

A. I think it was in 1952, but I can't be sure of that. It seems to me it was 1951 when he first was in my office. I have no way of knowing that.

Q. When did you first see the letter of April 27, 1951, which is referred to here as Exhibit 14,

(Testimony of John Wight.)

and in which I think we were reporting to Susan Wight?

A. It seems to me it was somewhere nine months to a year later. I can't be sure of it; I know it was a long time afterwards. It may have been over a year.

Q. By the way, who is Susan Wight?

A. She is my former wife, ex-wife.

Q. Former wife and wife?

A. No, I said, ex-wife.

Q. How long ago was it you were divorced, if that is what occurred?

A. About five years ago.

Q. You have continued since that time to act as her agent? A. Yes. [85]

Q. Where has she lived during the period since the divorce?

A. She is temporarily living in California; she still has her home in Billings.

Q. Up until recently she was living in Billings?

A. Yes.

Q. And you had your office in the Hedden Building in Billings? A. That's right.

Q. I believe you produced here a copy of that letter directed to the Mondakota Gas Company, of which you are the president?

A. I am the president now, yes.

Q. And how long was it after the date of that letter, April 27, 1951, that you first saw it?

A. Well, at that time, there was a fellow named Ladell, I believe, was president of Mondakota at

(Testimony of John Wight.)

that time, as I recall it now. I think it must have been a year after the letter was written before I saw it first.

Q. Where did you first see it?

A. I am not sure about that, but I think it was handed to me down in California, but I am not positive about it. We have an office in California, and the books and records of Mondakota are kept in California; although it may have been handed to me here. I don't remember now.

Mr. Lamey: May it please the Court, I would like to make reference to Mr. Wight's deposition on file, if it may be opened. [86]

Court: Yes, it may be opened.

Q. Mr. Wight, I will ask you to refer to page 34 of your deposition, which was taken in Billings on June 11, 1953, and ask you whether or not at that time you testified as follows, beginning with the fourth line, the fifth line from the top: "Question, You had prompt notice of the making of the contract between Shell Oil Company and Montana-Dakota Utilities? Answer, No, I had no knowledge of it whatever. Question, A letter was addressed to Susan Wight on April 27, 1951, a similar letter was sent to Mondakota, a similar letter to International Trust Company, and a similar letter to H. C. Smith and Haney? Answer, The first knowledge I received that the Montana-Dakota Utilities had made a deal with Shell Oil was by this lease man, Gadbois, told me. Later I saw those letters. Question, How soon after the deal was made was

(Testimony of John Wight.)

your information given to you by the Shell man?

Answer, It must have been very shortly after because he told me they made a deal with M.D.U. and couldn't make a deal with me. Question, In other words, very soon? Answer—" to the first sentence—"I assume very soon after that." Did you so testify at that time? A. I did.

Q. Now, you recall, do you not, that in the letter of April 25, 1955, reference was made to the [87] fact that a contract had been entered into with Shell Oil Company?

Court: 1951.

Q. 1951, I am sorry.

A. Yes, that's right.

Q. Does that help to refresh your memory that perhaps Mr. Gadbois was in your office sometime early in 1951?

A. No, my testimony in the deposition, and my statements now are the same because I said then I wasn't sure, and right now I am not sure of the date, but I did say then and I say now, I testified that the first I have recollection that M.D.U. made a deal with Shell is when Mr. Gadbois or one of the lease men from Shell told me. That was my first knowledge I had of the deal between M.D.U. and Shell.

Q. That would be when?

Mr. Erickson: To which we object on the grounds the question has been asked and answered.

Court: Overruled.

A. The first time I think Mr. Gadbois was in

(Testimony of John Wight.)

the office, I seem to place it somewhere in 1951. It seems to me it was in 1952 he told me he made the deal with Shell. I can't tell any more than that. It is my faint recollection. When it comes to dates, I didn't keep any record of dates. I am not good at remembering dates, so all I can do is give you my best recollection.

Q. Might he have talked about the agreement [88] with Fidelity when he was first in the office in 1951?

A. No, I have no recollection of it. I do have a recollection that I was in hopes of making a deal with them; I know all the time I was in hopes of making a deal with him. He came back the third time to tell me the deal was off.

Q. He came back the third time?

A. It seems to me it was 1952, but I may be wrong on that.

Q. About what time in 1952?

A. I can't tell you now at all; as I say, I have no way of knowing.

Q. You were well acquainted and kept in touch with conditions in the Cedar Creek Anticline in 1951 and 1952, were you not?

A. Yes, as far as any development. I can't tell what date a well was drilled or spudded in or this or that. All I know in a general way is what they were doing.

Q. Did you not know late in 1951 that Shell was drilling a well in the Pine Unit on the Northern end of the Cedar Creek Anticline?

(Testimony of John Wight.)

your signature? A. That's right. [91]

Q. That letter is directed to International Trust Company of Denver, which I understand is one of the plaintiffs in this case? A. That's right.

Q. Now, I call your attention to the last two sentences of the first paragraph, and particularly the last sentence, wherein it is stated, "However, we understand that they still claim some rights under and by virtue of the operating agreement." You so stated in that letter on July 12, 1951, did you not? A. That's right.

Q. That would be, of course, before you saw Mr. Gadbois, and he told you they were claiming interests, would it not?

A. No—it may have been—I don't think so. The first knowledge I recall having, the first time I would have any way of knowing that Fidelity had any rights was when Gadbois told me, because Fidelity never wrote and told me they had any rights, to the best of my recollection. Unless I could refresh my recollection some way, the first I had any definite knowledge or knowledge of any kind that Fidelity was claiming oil rights in the lands we were interested in in Unit 5 is when Mr. Gadbois or the other official of Shell told me you were.

Q. You have refreshed your recollection with this letter of July 12, 1951. Would you now say Mr. Gadbois told you about this prior to that date?

A. I would say definitely, yes.

Q. This letter, of course, does refer to a lease

(Testimony of John Wight.)

at Billings, 029521, which is one of the leases involved in this action, is that right?

A. That's right.

Q. So, then sometime prior to July 12, 1951, you found out and learned that Fidelity was still claiming under the operating agreement, at least as to the land in which International Trust Company was interested in, is that right?

A. That would be right.

Q. Now, you spoke of having talked with some other Shell man besides Gadbois?

Court: Pardon me, has this been offered in evidence?

Mr. Erickson: I have no objection.

Mr. Lamey: Pardon.

Mr. Erickson: I have no objection.

Mr. Lamey: We will offer it, then, your Honor.

The Court: Very well, it may be admitted.

(Defendants' Exhibit 16 admitted in evidence.)

Q. You indicated here you may have had some other discussions with Shell land men or representatives, is that correct?

A. I remember definitely that Mr. Gadbois was in the office, and I know there was another Shell man in the office talking about the leases, and I think there were three different men representing Shell in my office. [93]

Q. Who were the others besides Gadbois?

A. I am sorry, I couldn't tell you the names of them.

(Testimony of John Wight.)

Q. Well, when did the first one come?

A. I can't place the dates, but it was, it seemed to me like it would be somewhere between six months and a year prior to the time that I learned that Shell had made some deal with Fidelity for the oil rights involving the lands we claim.

Q. Six months prior to that, six or eight months?

A. I would say somewhere between six months and a year. I am just giving that as an estimate, refreshing my memory as best I can, it would be sometime between six months and a year, perhaps longer than that, before I learned they made a deal with Shell.

Q. It is rather definite in your mind that you saw Gadbois and he told you about the deal with Fidelity sometime prior to July, 1951?

A. All I can say, Gadbois is the first information I had, as far as I can remember, that the Shell had made a deal involving Fidelity and the lands we claim the oil rights under. I don't know what date that would be.

Q. There were some other representatives of Shell in to see you prior to the time Gadbois was there?

A. I am not sure; either shortly prior or shortly afterwards; I am not sure about that.

Q. Did two of them come together or did they come singly, or how? [94]

A. I think they were in there singly, I couldn't tell you for sure. We perhaps have 100 people a

(Testimony of John Wight.)

month come in our office to inquire about leases. I don't keep a record of them. They were just one or two or three men, people coming in to inquire about leases.

Q. Were all these conversations about these lands in Unit 5?

A. Conversations about lands mostly in Unit 5; there might have been some acreage in Unit 4, but mostly in Unit 5.

Q. Were they about lands involved in this suit?

A. Part of the lands involved in this suit. Practically all the lands we claimed any rights to in Unit 5 was discussed.

Q. You had other lands around Fallon County, did you not, or your company?

A. We perhaps might have had one or two small leases, I am not sure what I had on the main structure. I might have had one or two.

Q. Did Mr. Gadbois come alone, or somebody with him?

A. I am pretty sure he was alone.

Q. How many times did he come?

A. It is my recollection either three times or twice. However, the third time it is my recollection it might have been one of the other lease men.

Q. They were always dealing on the acreage involved in this suit? [95]

A. They came in the first time in answer to an inquiry in a circular letter I had sent out where we submitted these oil rights, told them we owned the oil rights. They came back and discussed the

(Testimony of John Wight.)

terms and the deal and so forth. The next time they came back was quite a little while after that. They said they were sorry they couldn't deal with us because they said they were satisfied Fidelity Gas Company controlled those oil rights, so there was no deal as far as we were concerned. I asked Mister, whichever one——

Q. Wait, I think you have answered the question. How long have you been president of Montdakota Gas Company?

A. The last time, possibly around two or two and a half years the last time—no, I was vice-president before that for awhile. I have been either vice-president or president most of the time for about 10 or 12 years.

Q. Well, Montdakota now has no further interest in any of the land in this suit, having dismissed its complaint as of today, is that right?

Mr. Erickson: To which we will object on the ground it is immaterial and irrelevant.

Court: Sustained.

Q. You testified this morning that you had an interest in the trust held by the plaintiff International Trust Company of Denver?

A. That's right. [96]

Q. Now, who are the beneficiaries under that trust?

A. My wife is beneficiary; I am—I am not sure whether I would be one of the beneficiaries or not, but there is no one else other than my wife, and perhaps myself.

(Testimony of John Wight.)

Q. By your wife, you mean your present wife?

A. My present wife.

Q. Was her name formerly Gerry?

A. That's right.

Q. Well, at one time, a Mrs. Wellington, or a Mrs. Middleton owned half of the beneficiary interest, did she not?

A. That's right.

Q. What became of that interest?

A. She had been paid the amount she invested, so she has no further interest.

Q. Did you take over that interest then?

A. Yes, I took over that interest. I was under the impression that I had modified the trust agreement giving that all to my present wife, but I am not sure. I think I did though.

Q. You think now your present wife is the primary beneficiary under the trust?

A. That is my recollection. I know that there was some discussion of amending that one time when I was in Denver. I think it was amended, but I am not sure.

Q. Is it a revocable trust? A. Yes. [97]

Q. And in the event of revocation, to whom does it go? A. To me.

Q. Who has the power of revocation?

A. I do.

Q. You also stated, I think, that you had some interest in the Susan Wight land or interest?

A. No actual interest. I have an interest to this extent: that it is up to me to try to do everything I can to protect her interests.

(Testimony of John Wight.)

Q. Is that in writing?

A. No, I don't think it is.

Q. Well, do you know?

A. No, in our settlement, I don't know whether that was in our settlement or not, I don't think it was. I believe that is just a verbal understanding that I have.

Q. You say you are obligated in some way to do everything you can to protect her interests, is that correct? A. I feel obligated, yes.

Mr. Erickson: To which I now object on the grounds it is incompetent, irrelevant and immaterial; in addition, of course, if there is an attempt here to impeach the title of Susan Wight, the title of Fidelity Gas and all the rest is deraigned from Susan Wight.

Court: No, I don't think that is being attempted. You brought forth that he was representing Susan [98] Wight, I suppose to try to show his lack of knowledge was the lack of knowledge also of Susan Wight, too.

Mr. Lamey: Your Honor, he went further and testified he had an indirect interest in Susan Wight and Smith and Haney.

Mr. Erickson: We have no objection to the matter. We think it encumbers the record. Our purpose in asking the question was to establish he was an interested witness so the matter of the weight of his testimony could be judged. I didn't want to put him forth as a disinterested witness. That was the purpose of it.

(Testimony of John Wight.)

Court: You then don't want the Court to understand at all that he was representing her or that she had no knowledge or anything of that nature?

Mr. Erickson: Probably insofar as Susan Wight, that would be true.

Court: Well, I think you had better go ahead and cross examine him.

Q. You testified this morning in the Susan Wight interest you had an indirect concern or interest. Now, what is that?

A. The only interest I have, as I said before, is in protecting her financial interest. I promised her I would do everything I could to protect all of the interest that had been assigned or had been conveyed to her in these properties. She knew nothing about it. I had been looking after those things of her for years. I promised I would do [99] everything I could, and I know this: I have this indirect financial interest: If she was to lose out on these interests, then I know it would be incumbent upon me to provide for her financial support, and that, on the other hand, if some of these properties I could look after would help provide certain financial care, it would relieve certain obligations on me later on. That constitutes my interest.

Q. Are you speaking now about some legal obligations such as a property settlement or decree of Court, or merely referring to a moral obligation you feel?

(Testimony of John Wight.)

A. I would say this way: It is a verbal understanding and promise we have.

Q. If she comes out well in these properties, you won't have to contribute anything to her support; on the other hand, if she comes out poorly, you would feel obligated to contribute?

A. That is my position, that is the position I take. I feel morally obligated to see that her interests are fully protected and that she realizes anything she can realize. If that is not a sufficient amount to take care of her needs, it is up to me to see they are taken care of.

Q. Other than that, would it make any difference to you one way or the other whether she succeeds or fails in this lawsuit?

A. Other than if she succeeded, I wouldn't get any money, but if she didn't succeed, it might eventually cost me money. [100]

Q. What is your indirect interest in the Cedar Creek end of this lawsuit?

Mr. Erickson: To which we make the objection it is incompetent, irrelevant and immaterial.

Court: Overruled.

A. I have a contingent interest in the Cedar Creek profits to this extent: That for financing the litigation and the cost of determining what their rights are, I will receive a certain percentage of whatever is gained or won, or is recovered or protected.

Q. Is that in writing?

A. That is in writing.

(Testimony of John Wight.)

Q. Do you have the document? A. I do.

Q. Mr. Wight, I now show you Defendants' Proposed Exhibit 17, and ask you if that is the written agreement that you have with the plaintiff Cedar Creek Oil and Gas Company with reference to your sharing in the outcome of this suit?

A. It is.

Mr. Erickson: To which we will object on the grounds, first, it is incompetent, irrelevant and immaterial, and in the second place, the question is framed without regard to the language of the agreement; it is not a proper statement as to what is contained in the agreement, but first because it is incompetent, irrelevant and immaterial. [101]

Court: It may be that the question was framed in words that might give the agreement some connotation other than what the agreement is.

Mr. Lamey: I will ask it another way. Mr. Wight, you have now examined Defendants' Proposed Exhibit 17. I will ask you if that is the only agreement you have with the plaintiff Cedar Creek?

A. It is.

Q. That indicates the only interest you may have in their side of the lawsuit?

A. That's right, that is the only agreement I have with them.

Q. Does this agreement, Exhibit 17, pertain to the lawsuit now on trial in this court?

A. Yes, it does.

Mr. Lamey: We now offer it.

Mr. Erickson: To which we object on the

(Testimony of John Wight.)

grounds and for the reason the exhibit is incompetent, irrelevant and immaterial, it doesn't serve to illustrate any issue in this case; further the date of the agreement is the 8th day of April, 1953, after the time of the commencement of this lawsuit, and for the further reason that it does not purport to affect the title to any of these lands or to give to Mr. Wight any interest in the lands in the event the litigation is successful. [102]

Court: Well, what is it, I thought that is what he said it was.

Mr. Lamey: May it please the Court, I believe counsel has indicated there are perhaps two or three other agreements. I am going to try to develop those now. Perhaps I will withdraw the offer until we get them all, and we will have a better chance to examine——

Mr. Erickson: To which we object. We believe the primary purpose is to prejudice the Court in this matter. I would like to have the exhibit offered, and I would object to the tender of any more agreements until there has been a ruling on the admissibility of them.

Court: I don't think that you can, or the Court either should determine the procedure that one party or the other wants to follow in presenting their case or presenting evidence. I may say I suppose your point is right, I don't know, I suppose that is one of the very points of this, not as you say, to prejudice the Court, but at least to inform the Court as to the witness' interest in the matter,

(Testimony of John Wight.)

and I don't know of any reason why that isn't permissible. The Court has to determine the credibility of witnesses. If these documents go to that, the Court must take them under consideration, but we don't have to rule on it now. Counsel has withdrawn his offer, but it would seem to me he is entitled to do that. I don't know why he shouldn't be.

Mr. Lamey: I am not trying to take advantage of counsel. I am going to try to expedite this. I have never seen these before. I want to get them all together.

Mr. Erickson: My position is if the Court accepts them, it is agreeable to us. I do believe as a matter of procedure since we do have an objection that counsel should offer it.

Court: I do think I agree. I think it would be better not to encumber the record by these matters if they don't go to the point you are thinking of, so it might be better for you, at some recess, to examine these documents before you even have them marked and presented.

Mr. Lamey: I think I will have these two marked. I will take the Court's suggestion and go to some other part of my examination and consider them later.

Court: Yes, consider them later. They may not even be admissible at all.

Q. Now, Mr. Wight, you spoke about being at a meeting in Billings, which I believe you said you thought was about 1932, at which some representatives of the Fidelity and others were present.

(Testimony of John Wight.)

Would you recall if that meeting occurred on or about the 2nd, 3rd and 4th of May, 1934?

A. I have no recollection that I did say it was in 1932. My recollection is it was in 1934. I didn't know I had made any statement that it was in 1932.

Q. Was there one or more meetings held in [104] Billings at which U.S.G.S. representatives were present, concerning these three agreements that have been set up in the answer?

A. According to my recollection now, it seems to me we had three different meetings, at least.

Q. At each of those, U.S.G.S. representatives were present, were they?

A. Yes, at each of those they were present. However, there was a meeting we did have that I don't think they were present.

Q. You have stated, I believe, that Mr. Heskett, R. M. Heskett, was present at at least one meeting?

A. I thought he was, but I wouldn't want to be sure of it. The more I think of it, the more I am in doubts Mr. Heskett was present at any of them. It seems to me he may have been present at one.

Q. Was Cecil Smith present at all?

A. Cecil Smith, I am quite sure was present at one, I know he was present at one; I think he was present at two.

Q. You said attorney Raymond Hildebrand was present?

A. I know definitely he was present at one

(Testimony of John Wight.)

meeting. I think he was present at two meetings.

Q. You were present, of course, at all meetings?

A. Yes.

Q. What about George Norbeck, was he present?

A. I am not sure he was present. I have some doubts that he was. [105]

Q. Your attorney, F. G. Huntington, was present also?

A. He was present at most of them, or perhaps all of them.

Q. Were the U. S. G. S. representatives H. J. Duncan, H. H. Perrigo, E. T. Vincent and P. J. Hegwer?

A. I have a definite recollection of Mr. Duncan and Mr. Perrigo was present at one meeting; I think they were present at two meetings. At another meeting, I think Perrigo was present; I am not such about Duncan.

Q. That was the meeting, was it not, at which you discussed these agreements, gas purchase agreement, gas unit agreement, and Fidelity Operating agreement?

A. I don't believe the Fidelity agreement or deep test agreement was discussed at those particular meetings. At those meetings, as I recall now, the unit plan was the business that was discussed. I am quite sure Perrigo and Mr. Duncan were not present at the time we discussed the terms of the Fidelity contract.

Q. Well, it was a part, or about the time of this

(Testimony of John Wight.)

over all meeting at which you discussed the other two agreements, was it not?

A. No immediate discussion of the Fidelity contract, I don't recall, was dovetailed in the discussion with the other, with the exception Montana-Dakota Utilities was offering that as an inducement for us to go ahead and execute the gas purchase agreement and the unit agreement, and we [106] would, therefore, get the deep test well, but I don't believe the Fidelity agreement was ever discussed as such in any of those meetings we had with Perrigo and Duncan, with U.S.G.S.

Q. Do you think it was discussed about the same time, but in the absence of those men?

A. Yes, it was discussed, but that was a meeting purely between myself, you might say, and M.D.U. officials, and it wasn't a subject that the U.S.G.S. had any interest in whatsoever.

Q. It is your recollection now that they took no part in any discussions pertaining to the Fidelity Operating agreement?

A. In fact, there wasn't too much discussion in regard to the Fidelity agreement anyhow; practically all the discussion was with regard to the unit agreement.

Q. Do you recall that George Norbeck was at those meetings?

A. He may have been at one of those meetings.

Q. He was a former owner of some of the lands involved in this suit?

(Testimony of John Wight.)

A. He was just holding title, not as trustee; he didn't really own them.

Q. From your testimony this morning, I understood that you have been active in obtaining leases in the Cedar Creek Anticline for many years. About when did that activity start on your part?

A. It started around about 1918. [107]

Q. And from that period on, did you obtain leases from time to time in all sections of the Cedar Creek Anticline, as represented by the plats or maps here, Exhibits 1 and 1-A?

A. Yes, I obtained leases from the south end extending down in South Dakota, North Dakota, and all the way up along the structure to Glendive.

Q. Were some of those leases taken in your own name?

A. A few of them were taken in my own name.

Q. But the greater portion were taken in the name of whom?

A. The greatest portion were originally taken in the name of Harry McDonald and D. J. Carter and Monarch—no, they were mostly in the name of D. J. Carter and Harry McDonald, and later in the Capital Gas, and then Atlantic Pacific, Herbert Stokes, possibly 30 or 40 or 50 other people.

Q. Were you more or less all working together?

A. We were all associated together at that time.

Q. Was Capital Gas Company a company in which you held some office?

A. Yes, in Capital Gas I held executive vice-

(Testimony of John Wight.)

president most of the time. George Norbeck was president.

Q. Is that company any longer active?

A. No.

Mr. Erickson: To which we are going to object because we can't see the relevancy or materiality of this line of questioning. [107A]

Court: What is the purpose of that counsel?

Mr. Lamey: The objection may be well taken.

Court: Sustained.

Q. And in the course of those dealings, I assume you took many leases and assignments of leases, did you not? A. Surely.

Q. And will you tell me whether there was a considerable amount of Government land in that Cedar Creek Anticline for leasing when you first began down there?

A. February 25, 1920, when the leasing act was passed, that opened up and made available for leasing perhaps 60 to 70 thousand acres of Government lands, or at least lands where the Government reserved the oil rights, on the Cedar Creek Anticline.

Q. There were some such lands in Unit 5, were there not?

A. Perhaps in the neighborhood of half the land in Unit 5, the oil rights were owned by the Government.

Q. I take it at that time you had experience in making applications for permits on land involved in Unit 5? A. Sure.

(Testimony of John Wight.)

Q. And made operating agreements at times with permittees on those lands in Unit 5?

Mr. Erickson: To which we object again on the grounds of relevancy and materiality.

Court: I don't see it is relevant. [108]

Mr. Lamey: I want to show his interest and knowledge here.

Court: I think he has said he was in there from 1918, owned leases himself, got leases himself and in the names of other people he was associated with, and has been continuously interested in the development there since 1918, from that time until this. I think that covers it pretty thoroughly. Let's take a short recess, well 10 minutes, until 10 minutes after 4.

(Ten-minute recess.)

Q. Mr. Wight, it is my understanding from your testimony that you knew about and were quite familiar with the drilling that was done by Fidelity beginning about 1935 and ending in 1937 on those three wells, that is, the N. P. No. 1, the Warren and the Smith No. 1?

A. I didn't have any interest in the Smith No. 1. I was somewhat interested in the original well, that is, the N. P. No. 1, to see if that would get production. I didn't pay attention at all to the Smith well, but I was vitally interested in the Warren well.

Q. Were you not interested in the N. P. 1 and Smith for the reason that if they had production,

(Testimony of John Wight.)

then, of course, it would reflect some interest in your land?

A. No, you see, I felt that oil down that far away on a separate structure wouldn't have much [109] bearing, if any on the lands I was interested in, so naturally I didn't pay much attention to the Smith well. I knew they were drilling, and that is about all.

Q. Did you feel, for instance, the later discovery in the Pine unit was of any interest to you?

A. Sure, I was interested in that well, too.

Q. Now, do you recall that commencing about May, 1941, the Carter Oil Company, under a contract with Fidelity, drilled a well on the southwest quarter of the southeast quarter, Section 9, Township 4 North, Range 62 east, which is marked on Exhibit 1-A as Carter N. P. No. 1?

A. I recall reading in the paper where Carter drilled, but I didn't know Fidelity had anything to do with the well. I never saw anything in there about whether it was drilled under a contract with Fidelity. I didn't know where they got the lease or how they got the lease, but it was so far away I didn't think it would have any bearing on where I was interested, in Unit 5.

Q. Did you later know that Husky Oil Company, in connection with Fidelity, drilled a well, commencing May, 1949, on the northeast quarter of the northeast quarter of Section 7, Township 4 North, Range 62 East, and which has been marked on Exhibit 1-A as Husky Oil N. P. No. 1?

(Testimony of John Wight.)

Mr. Erickson: To which we object on the ground there is no proper foundation, and for the second [110] reason that the question is incompetent, irrelevant and immaterial, and serves to illustrate no issues in this case.

Court: I don't understand what you are driving at, counsel.

Mr. Lamey: Well, the subsequent drilling that was done in conjunction with Fidelity on this Cedar Creek Anticline in attempting to develop these lower horizons.

Court: Under these agreements?

Mr. Lamey: That's right.

Court: The Husky well?

Mr. Lamey: That's right. It has been religiously avoided in the testimony. It would appear up until now there were only three wells drilled by Fidelity. Under contract with Carter, Carter drilled a well under the Fidelity agreement, and Husky later drilled a well under the Fidelity agreement.

Court: You may examine him if he knew about it.

Mr. Erickson: We make the further objection it is improper cross examination, and further it is an attempt to vary the terms of the written agreement.

Court: I don't think it is improper cross examination. He is talking about what he did know and didn't know other things. He can develop that.

A. I remember reading in the oil paper where Husky was starting to drill a well. I didn't pay any attention because it was so far away to have any bearing on the land I was interested [111] in, Unit

(Testimony of John Wight.)

5. It wasn't proving or disproving any additional territory that I could see, so I didn't pay any attention to the Husky well, and I did not know that Fidelity had any connection with the Husky well. I assumed that Husky went out and picked up its lease and drilled a well on its own.

Q. I take it then you didn't have enough interest in either of those wells or the drilling of them to make any inquiry?

A. No, I didn't have enough interest to make any inquiry at all. I just noticed it in the paper and that was all.

Q. And I assume that you noticed these paper reports about the time the wells were being drilled?

A. Yes, I glance over them. Dozens and dozens of wells are drilling in Montana. I just observe the notations in the paper to see how close it is to something I may be interested in.

Q. Let's go back to the Susan Wight lands just a minute, in Unit 5. Is there a production of gas from those lands? A. I don't think so.

Q. Gas has been produced from them, has it not?

A. Not that I know of—it is in the unit plan, yes.

Q. Yes, it is in the unit plan. A. Yes.

Q. You spoke here awhile ago of some monthly reports of payments for gas? [112]

A. That's right.

Q. Are those payments attributable to the Susan Wight lands? A. Yes, in Unit 5.

Q. Now, have there been any operations on

(Testimony of John Wight.)

there, either for oil or gas, other than these gas operations within the unit, under that gas unit plan since, say 1935?

A. The only operation that I know of in Unit 5 was that well they drilled in 1936 and abandoned in 1937, what we call the deep test well drilled for oil. However, I have noticed from time to time where there has been several Eagle sand wells drilled in Unit 5, and a few additional Judith River gas wells.

Q. Who drilled those wells?

A. The Montana-Dakota Utilities, in the reports I saw, drilled the Judith sand wells; I don't recall who drilled the Eagle sand wells.

Q. At any rate, they were drilled in connection with the gas unit operation?

A. No, not the Eagle sands, the Eagle sands weren't unitized. Neither Mrs. Wight nor anyone I know of gets any benefit from an Eagle sand well.

Q. Do you have any agency agreement with Cedar Creek, other than, let's exclude the agreement identified here awhile ago as Exhibit 17?

A. No, I don't. [113]

Q. You have mentioned, however, that you are sort of a representative of that company in this Cedar Creek area.

A. More as an old time friend just to help them look after their interests as best they can. I don't charge them anything for it. More or less being on the ground, and being old friends, more or less, I have taken the responsibility of trying to watch their interests.

(Testimony of John Wight.)

Mr. Lamey: Do you have the original of this?

Q. Mr. Wight, we show you the Defendants' Proposed Exhibit 20, and I will ask you whether you signed that original letter dated September 12, 1952, and directed to George H. Seivers, Secretary and Treasurer of Cedar Creek Oil and Gas Company?

A. I did.

Q. I call your attention to the last paragraph on page 1 wherein reference is made to a sheet attached thereto. We don't have in the depositions anywhere that sheet or a copy of it. Are you able to identify it and produce one? I would ask you to read that paragraph.

A. Which paragraph is that again?

Q. That last paragraph on page 1 of this proposed exhibit.

A. I don't believe I enclosed that sheet. However, I can identify it from the contract itself.

Q. Going back to the exhibit, you did write the letter on the date indicated? [114]

A. That's right.

Q. And in connection with that letter, did you send another form which I am about to show you now, Defendants' Proposed Exhibit No. 21?

A. I wouldn't say this is exactly the form I prepared, but I would say it is substantially in the form I prepared and mailed out.

Q. Was that letter and its enclosure written and prepared as part of your relationship, this friendly relationship with Cedar Creek Oil?

A. I would say yes.

(Testimony of John Wight.)

Q. And did it have to do with the lands that are involved in this suit in the causes of action in which Cedar Creek is interested? A. That's right.

Mr. Lamey: We offer these exhibits, 20 and 21, in evidence.

Mr. Erickson: May I see 21? We have no objection to Exhibit 21. We have no objection to Defendants' Exhibit 20 insofar as it is the letter of Mr. Wight addressed to George H. Seivers. We do, however, have objection to the relevancy of Defendants' Exhibit 20, and we also point out Paragraph 4, particularly, on the first page and raise the question of whether the exhibit does not have the effect, which has been disapproved by the Court, of amounting to a variance of the [115] terms of the contract by interpretation. It is only to relevancy and to that point that we raise the objection.

Court: The objection is overruled, and they are admitted.

(Defendants' Exhibit 20 and 21 admitted in evidence.)

Q. I would like to have the witness refer to the letter. I believe that is Exhibit 20, is it not? Now, Mr. Wight, again calling your attention to the last paragraph where you made reference, which reads "as per sheet attached hereto". I believe you stated you did not know where that sheet might be, but you could identify the paragraph to which you referred from the agreement? A. That's right.

Q. Do you mean the Fidelity operating agreement? A. That's right.

(Testimony of John Wight.)

Q. We will show you Exhibit 2 which has been introduced as a copy of that agreement. I will ask you to pick out the portion to which you made reference in this letter, Exhibit 20?

A. Well, it is the last part of Section 2 on page 2—Section 2 on page 2.

Q. Are you referring to the part which begins with the words “Forfeiture of all rights”?

A. That’s right.

Q. I will read to you what that sentence says, and then I will ask you to tell me whether or not that is the sentence [116] you referred to, “Forfeiture of all of the rights of second party as to respective lands upon which it shall be in default in the performance of the drilling, operating or producing obligations under this agreement and its failure to proceed to remedy such default within 30 days after receipt of written notice from first party thereof, shall be the exclusive remedy of first party against second party on account of any such default hereunder; and default in drilling of the test well as hereinafter provided shall be deemed default as to all of the lands subject thereto.” Is that the part you refer to in the letter?

A. That is the part I refer to.

Q. Now, in the first paragraph of that letter, Exhibit 20, you stated, “About 60 days ago a representative of Shell Oil Company came into my office and wanted to make a deal to lease the oil rights covering our lands in Unit 5.” Now, by “our lands”,

(Testimony of John Wight.)

do you mean all of the lands that are involved in this suit? A. That's right.

Q. Now, who was that representative of Shell Oil Company who came to see you about 60 days prior to September 12, 1952, and wanted to lease all of these lands in Unit 5?

A. It was either Mr. Gadbois or the other gentleman that I referred to that I don't remember his name with the leasing department of Shell. [117]

Q. And which one of the visits of the two or three that you referred to might this one have been early in July of 1952, the first, second or third?

A. It was either the first or second. It couldn't have been the third, because the third is when I got turned down.

Q. What is your best recollection now, having seen this letter of September 12, 1952, as to whether it is the first visit?

A. No, I guess you are right, I am wrong. This was after the third meeting, I think you are right. Yes, this letter was written after the third meeting.

Q. And would you say that the Shell representative had not yet told you about the Fidelity operating agreement with Shell at the time of this letter?

A. At the time of this letter, that is evidently after the third meeting when the Shell man told me Fidelity were claiming the oil rights.

Q. I call your attention again to the language which says, "A representative of Shell Oil Company came into my office and wanted to make a deal to

(Testimony of John Wight.)

lease the oil rights covering our land in Unit 5.” Now, do you still insist that is the time he turned you down?

A. In that first paragraph, evidently I was referring to the fact the Shell man had been in and made an offer, and later came in, in the second paragraph it would naturally [118] lead me to believe he had turned me down, and I was writing the letter out to Seivers and H. C. Smith because I had been turned down from making a deal with Shell.

Q. This letter was intended to tell Seivers that Shell had turned you down, is that right?

Mr. Erickson: To which I am going to object to the examination on the letter. The letter speaks for itself, it is there.

Mr. Lamey: I want to give the witness a chance to explain, if he can.

Court: Proceed. I will overrule the objection.

A. I can't tell you at this moment what was in my mind at that particular time as far as all phases of the letter, but refreshing my recollection the best I can from reading the letter, it is my recollection I intended to tell Mr. Seivers or apprise him of the fact I had been made a tentative offer and later on the Shell man came in and said he couldn't make the deal and that Fidelity claimed the oil rights.

Q. Mr. Wight, did Shell ever make you an offer on the Susan Wight land, or any other lands involved in this lawsuit?

A. I wouldn't say they made an offer; they indicated they were interested. I did quote a price. I am

(Testimony of John Wight.)

not saying they accepted it, but they indicated they were interested. I thought there was a pretty good chance I had a deal made to get a well drilled. [119]

Q. Now, coming to the third paragraph in that letter, it states, "About three years ago we sent out notices to the M.D.U. stating that all of the rights which they might claim by virtue of the old operating agreements and unit agreements entered into in 1934 and 1935 in respect to the deep rights were no longer valid by reason of the fact that the terms and conditions have been in default for nearly fifteen years." Who do you mean by "we" sent out notices?

A. That would be Susan M. Wight and the International Trust and I suppose W. B. Haney and H. C. Smith. Now, it is my recollection now I had sent similar notices to the Cedar Creek Oil and Gas Company. I may not have sent those original notices, however.

Q. Going back to International Trust, Mr. Wight, do you not know as a fact that International Trust never sent out any notice that you suggested it send to M.D.U. or Fidelity?

A. I am not so sure about that. It is my recollection they did. Now, they may not have, but it is my recollection they did.

Q. Now, were you referring in this letter to a form of notice that has been introduced as Plaintiffs' Exhibit 15, which is in blank, except for the year date, 1949?

A. No, that didn't refer to the same notice.

Q. All right, will you produce the notice you are

(Testimony of John Wight.)

referring to in this paragraph of Exhibit 20 that was sent out three [120] years in advance of this letter?

Mr. Erickson: May I inquire, Mr. Wight, off the record so maybe we can locate what it is he wants, or I can inquire on the record, I don't care.

Court: If it is agreeable to counsel. I don't think you can interrupt counsel's cross examination.

Mr. Lamey: I would like to continue my examination.

Q. You note that the notice in 1949, which I believe you have testified was sent out by Susan Wight, is that right?

A. Yes, this notice dated 1949 was, to the best of my recollection, was sent out to be signed by the International Trust, H. C. Smith, W. B. Haney and the Cedar Creek Oil and Gas and Susan M. Wight. That is the best of my recollection. However, there was another notice.

Q. There is another notice later that I will come to referred to in this letter, Exhibit 20. You might look at that.

A. Unfortunately I don't seem to have a copy available.

Q. Do you recall that the notice which is here dated 1949 was not sent in to the M.D.U. or Fidelity by Susan Wight until July sometime in 1951?

A. Yes, I have some recollection it wasn't sent in for a year or so after this date.

Q. Now, will you refer to Exhibit 21, which is the form of notice, and I will ask you if that is the

(Testimony of John Wight.)

form of notice, or substantially the form that you sent in with your letter of [121] September 12, 1952, to Seivers?

A. I would say it is substantially the same; I am not sure it is exactly the same.

Q. You would say it is substantially the same, as I understand it?

A. I would say it is, substantially, yes.

Q. Now, I would like to have you refer to the second paragraph of your letter which is marked Exhibit 20, which begins, "You should be careful, though, if you change any of the wording so you are not declaring a forfeiture at this time." In that paragraph were you referring to this form of notice which you were sending, which has been identified herein as Exhibit 21?

A. No, I don't think I was—oh, wait a minute—yes—no, it seemed to me like it was a notice sent out prior to this prepared along this general line at about the same time Exhibit 15 was prepared. In fact, I was under the impression they were both sent out at the same time.

Q. You are speaking now about Exhibit 21?

A. Yes, it seems to me, as I recall it, that Exhibit 21 and Exhibit 15—I mean I prepared a similar notice to Exhibit 21 at the same time I prepared the 1949 notice under Exhibit 15.

Q. Now, in this paragraph to which I have just called your attention, number 2 on the top of page 2 of Exhibit 20, you indicate that they should not make any changes so that "you [122] are not de-

(Testimony of John Wight.)

claring a forfeiture", and by "forfeiture", did you have reference to that portion of paragraph 2 of the Fidelity operating agreement to which you have just testified?

Mr. Erickson: To which I am going to object. I believe all this line of testimony is incompetent, irrelevant and immaterial, it doesn't serve to illustrate any issue in this case. I don't see the materiality of it.

Mr. Lamey: Your Honor, I am approaching it on the basis of interest and bias, just what he had to do in getting this together. I am going to bring it up to the time of this suit. This is preliminary to it.

Court: Well, I don't see that it has any materiality with reference to his interest in the matter, this particular line of questioning.

Mr. Lamey: The thing, sir, he is giving them instructions as to how to get around this provision in this agreement, you understand; he is furnishing the brains or the motivating power, so to speak, as to just what kind of notice he wants sent out. It seems to me it shows interest.

Court: Very well, you may proceed along that line.

Mr. Erickson: I would like to make the further observation, your Honor, the questions that have now been asked by counsel put it up to this witness to interpret the contract. Obviously, if we go into this line of testimony further, then the door is open to unlimited examination of this witness as [123]

(Testimony of John Wight.)

to his interpretation of the contract. I don't believe you can open it for the purpose of trying to show bias and still close the door for the purpose of further examination.

Court: That may very well be true, I am not sure, Judge. That very often happens, upon cross examination a field is opened up that permits you to go ahead. That may have happened here, I don't know, but on the other hand, it is also possible for counsel to examine this witness to show what was done in pursuance of their rights or claimed rights under the contract, and so I'll permit the examination. We will arrive at a determination of the other point later.

Q. I will put another question to you. Before you said you prepared a notice and sent it out to these people of your group in 1949?

A. I prepared it in 1949, but apparently it wasn't sent out at that time. I thought it was, but apparently it wasn't.

Q. You are referring to some notice other than Exhibit 21?

A. As I just testified a minute ago, it was my recollection I had prepared another notice similar to Exhibit 21 at the same time I prepared the notice in Exhibit 15.

Q. Well, Exhibit 15 must have been prepared in 1949, would you say?

A. Yes, it was prepared in 1949.

Q. Now, at that time you were firmly convinced

(Testimony of John Wight.)

that Fidelity was not claiming any interest under the agreement, were you [124] not?

A. I hadn't heard that they had, but I knew enough about them, I knew they would if they could. I didn't intend to let them claim anything they didn't have a right to claim. I wanted to close the door before they made a claim.

Q. That was in 1949?

A. I knew them well enough to know they would grab on to anything. As soon as Amerada discovered oil in North Dakota, I knew if there was any chance, they would be in to claim.

Q. Was it 1949 that Amerada discovered oil in North Dakota? I will give you the date of May, 1951. Was that the first discovery made by Amerada in North Dakota?

A. They started drilling in 1949.

Q. So, in 1949, then you thought Fidelity might be claiming some interest under this agreement?

A. As soon as it rather looked like it was becoming valuable, as soon as Amerada was going to drill, I knew if there was any chance of Fidelity or Montana-Dakota Utilities thinking they could claim it, they would do it. I thought I could forestall any claim they might put out. I didn't think they had a legal claim or right. I didn't know what a Court would decide. I thought they were out, defaulted, abandoned it.

Q. So, you then prepared some notice and sent it out to your group other than the two forms that have been introduced here so far, is that right?

(Testimony of John Wight.)

A. There was only two paragraphs in all of the contracts where I could find out there was a possible chance that M.D.U. or Fidelity could claim any rights. One of them was under the unit agreement where they had the option to unitize the lower sands; the other was in Section 2 of the Fidelity contract on page 2 in regard to the forfeiture, so in order to foreclose any possibility that the Fidelity Gas or M.D.U. could claim any rights thereunder, which I didn't want them claiming any rights they weren't legally entitled to, I had lost about \$80,000 and didn't want to lose any more to M.D.U., I did everything I did to close the door, to forestall them from claiming rights. That is why I had the notices prepared.

Q. That was long before Mr. Gadbois saw you?

A. It was.

Q. Now, did you send a form substantially the same as Exhibit 20 to the International Trust Company with the suggestion that it be sent out?

A. I think I did.

Q. And what about to Mr. Smith and Mr. Haney?

A. I was under the impression that I sent out a copy to Smith and Haney and International Trust and Mr. Seivers.

Q. And was this all part of your friendly relationship with this group?

A. There was three reasons for that, Mr. Lamey. One of them was my friendship and relationships with Seivers and Cedar Creek [126] and Haney and

(Testimony of John Wight.)

those people. The other was I knew if I got the land back, just a small amount of land like the Susan M. Wight land, there wasn't a chance in a hundred to get a well drilled eight to ten thousand feet deep, I would have to get some more land back. I had a selfish interest for my efforts. If I had a larger block of land, I would have a better chance to get a deep well drilled. The third reason was that Montana-Dakota had taken away from me about 80,000 acres, and I intended to see they didn't take another acre they weren't legally entitled to. Those are the three reasons.

Q. You sent that last notice, Exhibit 21 out about the same time as Exhibit 20, in September, 1952, is that correct?

A. Yes, I was under the impression, however, that I had previously sent out similar notices.

Q. Pardon.

A. I was under the impression I had sent out a year or so earlier than that a similar notice, but apparently I haven't.

Q. But you did send this notice you have just referred to, this notice, Exhibit 21, out about September 12, 1952? A. That's right.

Q. At that time, you knew, did you not, that Shell had discovered oil in the Pine area in the north of the Cedar Creek Anticline?

A. If they had discovered it, I knew it. I can't say the date. If they had discovered it, I would know it. [127]

(Testimony of John Wight.)

Q. It appears they completed Little Beaver well No. 1 July 30, 1951.

A. Yes, but that wouldn't be a discovery; that would be an extension of an old field; that wouldn't add or detract very much to the whole picture.

Q. Why, because of previous drilling?

A. Yes, previous drilling; they proved there was oil already there by previous drilling.

Q. Now, referring again to Exhibit 20, that letter. In the last paragraph you stated, "It may be necessary for us to join together to start another action to quiet title against the oil rights." Now, did you have reference to this action which was subsequently started?

A. That's right, that is what I had in mind. Then it developed into this action now pending.

Q. You also stated, "I am not certain that the present action we have pending covers that phase of the matter thoroughly enough." To what action are you referring?

A. That is the action to set the unit aside. That was the action we had pending, which is still pending, which I understand is still pending, to set the unit agreement aside.

Q. In the state court?

A. In the state court.

Q. In what county, do you recall?

A. I believe that is in Custer County. [128]

Q. Mr. Wight, you have testified that sometime after the Warren well was completed, that you made a trip to Minneapolis to see Mr. Heskett, pri-

(Testimony of John Wight.)

marily with reference to some further drilling in that well? A. That's right.

Q. Did anyone go with you on that trip?

A. I don't think so.

Q. What about Mr. Norbeck?

A. I don't believe he was with me on that trip; he may have been, but I don't recall right at this time.

Q. In your testimony this morning, I gained the impression that all of your conversations with Heskett and Smith were with them alone, and with no one else present?

A. I am not so sure. That is so long ago, I can't recall. Norbeck may have been present one time at one meeting, but at this particular moment, I don't seem to have a recollection that he was. I am not saying he wasn't.

Q. Mr. Wight, I call your attention to page 25 of your deposition taken June 11, 1953, in Billings, and at the top of the page, beginning with the question, "In whose office?" I will ask you whether at that time of your deposition, you testified as follows: "Question, In whose office? Answer, I talked with Mr. Heskett in his office there quite a long time. Question, Who was present? Answer, On one of our meetings George Norbeck was present, and one of the other [129] meetings a man by the name of B. E. Terry was present. Question, He was formerly president of Montana Eastern Pipe Line Company? Answer, That's right." Did you at that time so testify? A. I did.

(Testimony of John Wight.)

Q. Does that now refresh your recollection that George Norbeck was present at one conversation with Mr. Heskett?

A. At the time I made the deposition, previous to that, I had been looking through our files and anything I could to refresh my memory, so I must at that time have had something there that Norbeck was present. I said now I didn't recall at this moment that he was present, but he might have been.

Q. What about B. E. Terry?

A. Terry lived in Minneapolis. I remember several times I met Mr. Terry and we went up to Mr. Heskett's office, so evidently he was present, too, at one meeting.

Q. Can you recall at this time anyone else who may have been present?

A. No, I don't think so. In fact, most of my meetings with Heskett, I was alone. Very few times I had anyone with me when I would meet Mr. Heskett or Mr. Smith.

Q. Is George Norbeck dead?

A. Yes, he is dead.

Q. Is B. E. Terry dead?

A. I think he is; I heard he was, but I am not sure. [130]

Q. Now, give us your best recollection of the date on which you went to Minneapolis to see Mr. Heskett with reference to the Warren well?

A. After looking through whatever records and files that I thought would refresh my memory in the last week or two, I am now of the opinion the first

(Testimony of John Wight.)

meeting I went to see Mr. Heskett was possibly either just before they abandoned the well, or just after they abandoned the Warren well, because it is my recollection at this time I went down to see him at the time I heard they were going to abandon the well, but at that time I don't believe they had fully abandoned it.

Q. All right, what year was that?

A. The first part, evidently, of 1937.

Q. Could it have been in the spring of 1938?

A. I did go down there in the spring of 1938 and talk to Mr. Heskett. I remember that very distinctly. That was apparently a year after the well had been abandoned.

Q. That you went down there?

A. Yes. As I say, I remember going down right after the well, or when the well was being abandoned, and I remember going down eight or nine months or a year after that to see if I couldn't get him to change his mind.

Q. You think you were down there in the spring of 1937, and also in the spring of 1938?

A. Yes; I would say definitely it would be winter or early [131] spring of 1937, then in the fall of 1937, then again during 1938.

Q. On each of those occasions you talked to Mr. Heskett about the Warren well?

A. Mr. Heskett, and also once or twice, maybe three times, I talked to Mr. Smith.

Q. All right. I would have you refer to page 24 of your deposition which has been heretofore iden-

(Testimony of John Wight.)

tified, and referring to your examination then with reference to conversations with Heskett and Smith, I will ask you if you testified to the question, "Where"—do you find that about 10 lines down?

A. Yes.

Q. And the answer, "In their office in Minneapolis. Question, When? Answer, It was the spring of 1937, or could have been in the spring of 1938. Question, Either in the spring of 1937, or the spring of 1938? Answer, I didn't put down the date, but I do know this, and I definitely can identify it from the time they made the announcement— Question, What announcement? Answer, The announcement they were plugging and abandoning that well." Did you so testify? A. That's right.

Q. By "that well" that you have referred to here, are you referring to the Warren well?

A. The Warren well, yes.

Q. What is your best recollection now of just when you were [132] down there the first time to talk to Heskett and Smith?

A. Since we have definitely determined now that the well was abandoned in January, 1937, I would say definitely I was down there in the early spring of 1937, about the time, as I say, the well was being abandoned. That is the first trip. Then I made another trip four or five or six months after that.

Q. I noticed this morning when Judge Erickson was questioning you on these dates, you referred to some memoranda, checks or something else?

(Testimony of John Wight.)

A. Yes.

Q. Now, do you have any such memoranda that would help you in fixing this first visit or date?

A. Well, I have one cancelled check here of April 8, 1938, given to the Nicollet Hotel. That was the spring of 1938. That was one of the trips down there endeavoring to get Mr. Heskett to reconsider and drill deeper. I didn't find any cancelled checks for 1937. However, in August, 1937——

Q. I would like to see that? Is that those two? Get the two of them if those are what he is basing his previous testimony on.

A. I am not basing my testimony entirely on those checks, only as to two dates.

Q. I notice that the second check to which you refer to the Powhatan Hotel is dated August 13, 1937. Does that indicate something to you with reference to these conversations? [133]

A. Yes, I remember definitely before I went to Washington, D. C. on that trip, I stopped in Minneapolis and conferred with Mr. Heskett about deepening the well or drilling another well, and then I went on to Washington, D. C. to see what I could do about raising some money and to New York.

Court: I think it is time for a recess, counsel. Court will stand in recess until 10 o'clock tomorrow morning.

(Whereupon, a recess was taken until the following morning, April 14, 1955, at 10 o'clock, A.M., at which time the following proceedings were had:)

No. 15293

United States
Court of Appeals
for the Ninth Circuit

CEDAR CREEK OIL AND GAS COMPANY,
a corporation, INTERNATIONAL TRUST
COMPANY, a corporation, H. C. SMITH,
SUSAN M. WIGHT and W. B. HANEY,
Appellants,

vs.

FIDELITY GAS COMPANY, a corporation,
MONTANA-DAKOTA UTILITIES COM-
PANY, a corporation, and SHELL OIL
COMPANY, a corporation, Appellees.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 345 to 713, inclusive)

Appeal from the United States District Court
for the District of Montana
Billings Division

FILED

JAN 23 1957

PAUL P. O'BRIEN, CLERK

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(Testimony of John Wight.)

Q. Mr. Wight, about the time we concluded yesterday, some reference had been made to a check given in August, 1937, to the Powhatan Hotel.

A. Right.

Q. Where is that hotel located?

A. That is in Washington, D. C.

Q. Mr. Wight, when you first made your trip to Minneapolis to see Mr. Heskett and Mr. Smith with reference to the Warren well, which I think you fixed as early in 1957 or 1951——

A. 1937.

Q. How long did you remain there—I am sorry, 1937?

A. Yes, 1937. It is my recollection somewhere between a week and 10 days.

Q. And I believe when your deposition was taken here in Billings on July 11, 1953, you testified to that effect, that you had been there for about a week? [134]

A. I think so, that is my recollection now.

Q. And, if you want to look at your deposition, you may, but do you also recall when that deposition was taken that you went on to relate the conversations that you had with Mr. Heskett and Mr. Smith during that visit?

A. That's right.

Q. I would like to have the deposition made available to the witness, please, Mr. Johnson. Mr. Wight, I will ask you to look at page 26, especially, and what I have been examining you about took place on the pages just preceding. Now, I will ask you whether or not at the time this deposition was taken, that you testified as follows, that is at the

(Testimony of John Wight.)

bottom of the page, the last question on the page, "Question, Did you have more than one conversation with Mr. Heskett? Answer, It is my recollection that during approximately the week I stayed in Minneapolis on that trip that I had three or four conversations with Mr. Heskett, but I can't tell you how many I had because I know I had practically nothing else to do there at that time but confer with Heskett and Smith. I know we spent about a week there at that time." Did you so testify then at that time? A. That's right.

Q. I have been unable to find in your deposition anywhere where you made any reference to any other visit with Heskett or Smith concerning this subject later in 1937 or early in [135] 1938. Do you find any? A. I would have to——

Q. Well, do you recall any, I know it is not there?

A. Yes, since I gave my deposition, I have been going through a lot of our old files and trying to refresh my memory the best I could, and in doing so, I have a quite distinct recollection of being in Minneapolis in the fall of 1937, at which time I again, I remember, conferred with Mr. Heskett and, I think, Mr. Smith, and then it is also my recollection that the following year I stopped in there and also discussed the matter with them.

Q. That information has been brought to your mind since your deposition was taken in 1953, is that right?

A. Yes, if it isn't in the deposition. I don't re-

(Testimony of John Wight.)

member now whether I did so testify in my deposition. If I didn't, then, the reason I would testify to that now is because from the information I have been able to find in my files which would refresh my memory to a point of where now I was satisfied I was in Minneapolis in the fall of 1937 and also in 1938.

Q. Did you not make an effort at the time your deposition was taken to refresh your memory as to conversations and dates?

A. I didn't have quite enough time at that time to go through my old files. In fact, there was still a lot of my old files stored away that I haven't had a chance to go through yet.

Q. Do I recall correctly your testimony of yesterday when I [136] called your attention to the fact that perhaps Terry and Norbeck were present that you then told me that you remembered that back when your deposition was taken because you had made a review of your records and files?

A. Some of them, but as I say, before I took the deposition, I didn't have time enough to go through very many old files to try to refresh my memory. I know I am very poor when it comes to remembering dates. I thought always I was very good on details, but not on dates.

Q. Mr. Wight, showing you the Defendants' Proposed Exhibit 18, I will ask you to examine it and tell me whether your signature appears thereon? A. It does.

Q. And what other signature is there?

(Testimony of John Wight.)

A. H. C. Smith.

Q. And is he the same person who is one of the plaintiffs in this case? A. He is.

Q. Yesterday on direct examination, you testified that you had an indirect interest in the H. C. Smith property, did you not?

A. Proceeds. I didn't intend to say I had an interest in the property, in the proceeds.

Q. Does the document, Exhibit 18, which you are now examining cover or describe the interest that you have? [137] A. It does.

Q. And is that the only writing that you have describing your interest in the H. C. Smith profits or properties?

A. I am quite sure it is. I don't recall of having any other instrument or document of any kind.

Q. I now show you Defendants' Proposed Exhibit 19, and will ask you if you signed that?

A. I did.

Q. And what other signature is on the letter or agreement? A. W. B. Haney.

Q. And is he the same person, W. B. Haney who appears as plaintiff in this case? A. It is.

Q. You testified on direct examination you had an indirect interest in the properties or profits of Mr. Haney, the plaintiff in this suit?

A. That's right.

Q. Does Exhibit 19 represent or describe the interest that you have indirectly in the cause of action of W. B. Haney? A. It does.

Q. Do you have any other agreement with W. B.

(Testimony of John Wight.)

Haney which in any way describes or sets forth an interest you may have in his cause of action?

A. No other agreement.

Mr. Lamey: Now, may it please the Court, I renew the [138] offer of Exhibit 17 and now offer in evidence Exhibits 18 and 19 for the purpose of showing the interest of this witness in the outcome of this litigation.

Court: Any objection?

Mr. Erickson: Just a minute. For the purposes for which they are offered, we have no objection.

Court: Very well, they are admitted.

(Defendants' Exhibits 17, 18 and 19 admitted in evidence.)

Q. Mr. Wight, on page 3 of Exhibit 17, there appears this language, "It is understood that second party has already made a commitment promising to assign a twenty-two percent contingent interest to certain parties who did agree to finance said litigation," end of that quotation. Now, who are those certain parties?

Mr. Erickson: To which we are going to object because it is improper cross examination, there is no testimony as to any other agreements, it is incompetent, irrelevant and immaterial, and it is outside the purpose for which the document is introduced.

Mr. Lamey: That would depend, your Honor, on the person to whom these assignments were made. It appears in the document, it is in evidence. I don't think we would be able to understand it without

(Testimony of John Wight.)

information—all I am asking is the name of the persons, and I can tell whether it is relevant.

Court: The objection is overruled. [139]

A. I had a commitment made with a man by the name of Gordon Butterfield. However, as the agreement was later prepared, it excluded this case and applied to the so-called 30 million dollar action which I had pending at that time against the M.D.U. which was later dismissed, or pertaining to both damage actions. Originally it was going to include all litigation that I would have or did have against the M.D.U., but as finally drawn up, it excluded, or didn't include this pending litigation we are in now.

Q. So then as far as this agreement refers to certain other parties who might have a 22 per cent contingent interest, that is no longer effective?

A. Not as to this particular case.

Mr. Lamey: You may cross examine, or redirect, I am sorry.

Redirect Examination

Q. (By Mr. Erickson): Mr. Lamey has asked you, Mr. Wight, about the circumstances under which in the deposition you testified to only one trip to Minneapolis, and now you testify to more; calling your attention to the check which I believe should be put in evidence because there is so many references to it, the check having been marked Plaintiffs' Exhibit 22, and which is now offered——

Mr. Lamey: No objection.

Court: Admitted.

(Testimony of John Wight.)

(Plaintiffs' Exhibit 22 admitted in evidence.)

Q. Did you discover that check after the time the deposition was taken? A. I did.

Q. And did it serve to bring to your memory a second trip you made to Minneapolis?

A. It did.

Q. And under the circumstances related on your direct examination? A. That's right.

Q. And on the direct examination, I believe you testified you stopped in Minneapolis on your way to Washington, is that correct? A. That's right.

Q. Did you testify you stopped on your way back also? A. On my way back also.

Q. I call your attention to a check dated April 8, 1938, made payable to the Hotel Nicollet, which has been marked as Plaintiffs' Proposed Exhibit 23, and will ask you if that is a cancelled check you had in your possession? A. It is.

Q. Did you discover that check also after the time of the deposition? [141] A. I did.

Q. And that check was given to the Hotel Nicollet at Minneapolis, is that correct?

A. That's right.

Q. Was it given to the hotel at a time you were in Minneapolis?

A. At a time when I was in Minneapolis.

Q. It is drawn on a form of check blank where the name of the bank is typed in, is that correct?

A. That's right.

Q. Did you secure that at the hotel?

A. I did.

(Testimony of John Wight.)

Q. And with relation to this check, would that also serve to refresh your memory as to the third trip as you have testified on direct? A. It did.

Q. Your testimony was that at the time of the 1938 trip, in the spring, you also had a discussion with Mr. Heskett and probably Mr. Smith, is that right? A. That's right.

Mr. Erickson: We now offer Plaintiffs' Exhibit 23.

Mr. Lamey: No objection.

Court: Admitted.

(Plaintiffs' Exhibit 23 admitted in evidence.)

Q. Calling your attention, Mr. Wight, to Defendants' Exhibit 20, counsel asked you to explain your purpose in writing the [142] language contained in the fourth paragraph of the first page of that exhibit, or, Mr. Wight, that should be the second paragraph on page 2. Will you examine that paragraph? You have now read paragraph 2 on the second page? A. Yes.

Q. That is the paragraph that has to do with a caution to the receiver of the letter as to the declaration of a forfeiture, is that correct?

A. That's right.

Q. Mr. Wight, when you wrote that language, what was your purpose?

Mr. Lamey: May it please the Court, at that time yesterday when I asked that question, counsel objected to it, and then we had some discussion with reference to it. The question was never answered, and I went on with another question, and

(Testimony of John Wight.)

I now object to it as improper cross examination, cross examination on a point to which counsel himself objected when it came up in Court; that is when we had the discussion as to whether or not that would open up some interpretation of the agreement, as the Court will remember.

Court: Well, I'll overrule the objection. You may answer the question, and the Court won't consider the evidence as being an interpretation or changing or varying the terms of the contract, but to explain and show the state of mind of the parties and what they did and how they acted under the [143] agreement. For that purpose I will admit it.

Mr. Erickson: That is satisfactory to the plaintiffs.

Mr. Lamey: Read the question, please?

(Question read back by reporter.)

Q. Will you tell us what your purpose was?

A. I did not think that the Fidelity or that the Fidelity Company had any rights left under the contract, but I didn't know how they might interpret it. I did not want to reinstate any rights that they had defaulted on, in my opinion, for 15 years, by giving them some notice which might possibly have an effect of giving them the right then to come in and cure some apparent defect, which I didn't think existed, so I naturally cautioned my group to be very careful in wording the cancellation notice in such a way that Fidelity Gas Company could not interpret the notice as giving them

(Testimony of John Wight.)

the right to have 30 days to come in and cure something I didn't think they could anyhow.

Q. You are referring to 30 days, does that have reference to some language in the so-called operating agreement, exhibit 2? A. It does.

Q. Can you tell us by looking at the contract what paragraph that has reference to, and what language?

A. It is the last part of Paragraph 2 on page 2 of the Fidelity contract. This is the language: "Forfeiture of all [144] of the rights of second party as to respective lands upon which it shall be in default in the performance of the drilling, operating or producing obligations under this agreement and its failure to proceed to remedy such default within 30 days after receipt of written notice from first party thereof, shall be the exclusive remedy of first party against second party on account of any such default hereunder."

Q. That is the language you had in mind when you wrote that?

A. That is definitely the part of the contract I had in mind when I cautioned my group not to send out any notice which could be possibly construed by the Fidelity Gas Company as recognizing that they might possibly have some rights under that paragraph.

Q. In sending out the form of notice that you asked your group to sign, why didn't you take the position that the forfeiture had to be declared under that section?

(Testimony of John Wight.)

A. Because there was only one obligation that Fidelity Gas Company had, and that was to drill one well, then if they got a producer, then they had the second obligation to produce.

Mr. Lamey: May we object to this testimony? The document itself is in, it is the best evidence. This is an opinion being volunteered by the witness, incompetent, irrelevant and immaterial.

Court: It is incompetent and irrelevant insofar as interpretation of the contract is concerned, but for the purpose [145] for which counsel is questioning, the objection is overruled, just to show the circumstances and the state of mind of the party in his negotiations and operations.

Mr. Erickson: That is the extent, and for that purpose only do we offer it.

A. In preparing the——

Court: In other words, what he says the contract means——

Mr. Lamey: Trying to explain the letter, is that right?

Court: Yes.

A. In writing this letter, I had in mind my view of the contract which was that Fidelity Gas Company had fully complied with the terms and conditions of that contract, that we had no right to obligate or require them to go any further so long as they had drilled one well in accordance with the contract and hadn't encountered any production, and there was no further obligation to drill. They were not in default in drilling, and they

(Testimony of John Wight.)

didn't get production, so they were not in default on production, so, therefore, I figured the contract was dead, and I didn't want to do anything to possibly revive it.

Q. So, that in your mind at the time you prepared the cancellation, you understood this language didn't apply to a situation where the deep test had been drilled, and nothing further done, is that correct?

A. As I said before, I figured the contract had been lived [146] up to and expired and was no longer in force and effect, and there was no further obligations they had, and I didn't want to say or do anything that could reinstate something I thought had been dead for 15 years.

Q. When you say they lived up to the contract, you mean they drilled the first test well?

Mr. Lamey: Object to that as leading.

Court: Sustained.

Q. When you spoke of them having lived up to the contract, what did you mean by that?

A. Under the terms of the contract, as I understood it, they obligated themselves to do two things, first to drill a well in the south end of the field, which they did; then if they got production there, they had the option to drill a second well, which they promised verbally to drill on Unit 5, which they did, they drilled the second well, so they complied, in my opinion, with the terms of the contract. As long as they didn't get production, there was nothing more they could be in default on.

(Testimony of John Wight.)

Q. Mr. Wight, yesterday we asked you certain questions concerning conversations with representatives of the Fidelity Gas Company and Montana-Dakota Utilities Company at the time the contract, Exhibit 2, which is the deep test agreement, was made, and we asked you certain questions concerning conversations as to what would happen in the event there was a deep [147] test well drilled which was unsuccessful, and we made an offer of proof after our questioning, after the objection to our questioning was sustained. Now, for the purpose, and for the only purpose of explaining the circumstances under which the agreement was signed, and your state of mind at the time, was there a conversation at the time this contract was negotiated and before it was signed as to what would happen in the event the testing program were unsuccessful?

Mr. Lamey: Object to that as incompetent, irrelevant and immaterial, being an attempt to elicit from this witness the same evidence that the Court sustained an objection to, both on the questioning and on the offer of proof, and it is incompetent, irrelevant and immaterial, an attempt to vary the terms of a written instrument, and outside the issues in this case, and, may it please the Court, since yesterday, we have prepared a memorandum on this covering the statutes and decisions of the State of Montana, and we think that there is not the slightest question that this is not admissible. The Court was correct in its ruling yesterday, and we have that available to submit to the Court.

(Testimony of John Wight.)

Mr. Erickson: May I add to the purpose, for the purpose of explaining what seems to us would be a patent ambiguity in the contract between the habendum, which is the "Now, Therefore" clause and Paragraph 4, and of course, we think the cross examination opened this question also. There were other questions [148] asked after the one to which I made objections, and some of the answers were volunteered on the part of Mr. Wight as to the meaning of the contract and the circumstances under which the contract was made, and there was no motion made to strike. It was on cross examination.

Mr. Laney: I recall of no such evidence, your Honor.

Court: Counsel, I think your offer, and the purpose for which you offer it may still be too broad. The objection of counsel is good. It doesn't appear to me that the Court can receive evidence with reference to the interpretation or explanation of any alleged ambiguity without a proper foundation having been laid by way of pleading, so I will have to sustain the objection.

Mr. Erickson: I would ask the same question then, deleting the latter portion of the purpose.

Court: To explain or interpret the contract?

Mr. Erickson: Yes, and for the further reason that the question would elicit an answer which would be an interpretation of the contract by the adverse party. If the answer is what I would

(Testimony of John Wight.)

anticipate it to be, it would be an admission against interest on the part of the adverse party.

Mr. Lamey: I am in no position to follow that and make objection. I think if counsel has another question in mind, he should state it.

Court: Yes, I don't see that I can rule upon any anticipation [149] that you may have as to what he says. You will have to present the matter in a different light.

Mr Erickson: I have to get by the first question as to whether there was a conversation.

Court: Yes, I think I will be inclined—as I say, the offer you made was too broad, and it included an offer to have the evidence admitted for the purpose of interpreting or explaining an alleged, now you say, an ambiguity of the contract. There is no allegation in the pleadings that there is any ambiguity in the contract, you ask no reformation of the contract or no interpretation of the contract, so the offer of the evidence for that purpose, I would sustain the objection. If you offer it for some other purpose, I will consider it.

(Question read back by reporter.)

Q. What is your answer to that question, Mr. Wight?

A. There was a conversation, yes.

Q. With whom was that conversation held?

A. I think there was Cecil Smith with either Alger Syme or Raymond Hildebrand. I don't remember now whether they were all three there, or just one of them with Cecil Smith.

(Testimony of John Wight.)

Q. How did there happen to be a conversation such as you have mentioned?

Mr. Lamey: May I have the question?

(Question read back by reporter.) [150]

Mr. Lamey: May it please the Court, we object to this entire line of questioning as incompetent, irrelevant and immaterial; it would have no bearing upon the issues in this case, nor could it vary the terms of the agreement which has been admitted into evidence as Exhibit 2, and we think that under Section 93-401-13, that since the agreement was reduced to writing, there being no allegation with reference to mistake or imperfection, the validity of the agreement not being in dispute, that they are foreclosed from going into any conversations in the course of negotiations.

Court: Yes, on that basis I have ruled and continuously ruled I will not receive any evidence to vary the terms of the contract.

Mr. Erickson: We are not offering it for that purpose.

Court: For what purpose are you now offering it?

Mr. Erickson: I am offering it for the same purpose the other testimony is offered, to show the parties' or practical interpretation of the contract under the general rule which permits that in the same section, 93-401 and the various sections there contained.

Court: His own interpretation of it has no bearing on the case at all.

(Testimony of John Wight.)

Mr. Erickson: It is both parties we are dealing with here.

Mr. Lamey: May it please the Court—— [151]

Mr. Erickson: May I—I also call the Court's attention to Section 93-401.17, for the proper construction of an instrument, the circumstances under which it is made, including the situation of the subject of the instrument and of the parties may also be shown so the Judge can be placed in the position of those whose language he is to interpret.

Court: I have indicated already and ruled that you may show the circumstances under which the contract was made, not for the purpose of varying any terms of the contract, but to show the circumstances under which it was made, that there were negotiations. As a matter of fact, the question has been raised as to who made this contract, is it the contract of the defendant and should it be strictly construed against him, and for the Court's information, in order to determine whether or not the contract should be strictly construed against one party or the other, we ought to know how the contract was made. For that purpose, I will permit you to examine with reference to the circumstances surrounding the entering into of the contract.

Mr. Erickson: So the record will be clear, I would state that the purpose of this question and the testimony we had hoped to elicit is that at the time the contract was under negotiation, and in the study of the various provisions, the question came up as to what would happen if the deep test weren't

(Testimony of John Wight.)

successful, and the parties, both sides, said that [152] would be the end of the contract. I don't believe that varies any term of the contract. That was the testimony we had hoped to elicit on this particular question.

Court: You are really then trying to interpret the contract.

Mr. Lamey: Not only interpret it, but put in a provision that is not there.

Court: For that purpose, the objection is sustained.

Mr. Erickson: May I ask one other question along that line just to be sure I have my record made?

Court: Yes.

Q. I have already asked you about paragraph 4 of the agreement, which says if a second test well is not commenced before September 1st of any year, that additional time may be given to April 1st of the following year to commence the additional test wells. You have read that language?

A. Yes, I have.

Q. Was the conversation about which I asked you concerning that paragraph? A. Yes.

Q. Was there a discussion at the time between the parties as to the effect of paragraph 4?

A. Yes.

Mr. Erickson: Your Honor, I hope you will appreciate I am not trying to get around the position stated by the Court. [153]

Court: That is fine, and I might say that later

(Testimony of John Wight.)

when this matter is briefed, if you brief this question, it may be that the Court would have to reopen the matter to receive the evidence if I find your position is correct.

Mr. Lamey: I think there was an offer of proof yesterday in which you stated your position.

Mr. Erickson: I don't believe it completely covered this. I will ask one more question for the purpose of making my record.

Q. What was said by the representatives of the Montana-Dakota Utilities or Fidelity Gas as to the effect of Paragraph 4?

Mr. Lamey: We object to that as incompetent, irrelevant and immaterial, being an attempt, it is an attempt to vary the terms of the written instrument by conversations that took place before the agreement was executed; it is outside the issues of this case; there is no pleading attempting to set up a mistake or imperfection in the agreement, and the validity of the agreement itself is not in dispute.

Court: Sustained.

Mr. Erickson: The offer of proof that has been made heretofore, in the light of this question, is sufficient to raise the whole thing.

Court: As I say, that wouldn't help you on appeal, but so far as I am concerned, you may brief the question when the time comes, and we will give it consideration without reference [154] to any technical failure on the part of the offer of proof, so far as that is concerned, if there is.

Mr. Erickson: With that in mind where it would

(Testimony of John Wight.)

be reviewed in an appellate court, I would now offer to prove through this witness that discussion was had at some length between this witness, Mr. Smith, perhaps Mr. Syme and other representatives of Montana-Dakota Utilities and Fidelity Gas, and in that conversation the representatives of the Montana-Dakota Utilities and Fidelity Gas stated that the language of Paragraph 4 gave to the Fidelity Gas an option to drill further test wells if the first test wells were unsuccessful, and in the event they did not drill additional test wells within the provisions of Paragraph 4, the contract would be totally terminated.

Mr. Lamey: To which offer of proof we object as incompetent, irrelevant and immaterial, no proper foundation has been laid for the reception of such evidence, it is an attempt to vary the terms of a written instrument by conversations that took place between the parties prior to the execution of the agreement; it is outside the issues of this case in that there is no pleading of any mistake or imperfection of this agreement set forth in the pleading, and the validity of the agreement has not been attacked.

Court: Sustained.

Mr. Erickson: In view of the objection that was made by [155] counsel that the conversation occurred prior to the execution of the contract, I want to ask Mr. Wight if there was any similar discussions of Paragraph 4 after the time the contract was executed? A. Yes.

(Testimony of John Wight.)

Q. And with whom was that conversation?

A. That was also with Mr. Heskett, and I think once with Cecil Smith, and I am sure there was once or twice with Mr. Syme.

Mr. Erickson: We make the same offer of proof as to the conversations which occurred after the execution of the contract.

Mr. Lamey: We make the same objection with the addition that this offer of proof attempts to vary the terms of the written instrument by subsequent parol conversation.

Court: Sustained.

Q. Mr. Wight, on the direct examination, I asked you when you first saw the operating agreement, Exhibit 2?

A. Sometime in 1934. It was furnished me about the same time that we had, or I had one of our meetings in Billings here where Mr. Duncan and Mr. Perrigo and Mr. Smith, Mr. Norbeck and Mr. Hildebrand was present.

Q. I thought you testified, Mr. Wight, that Duncan, Perrigo and the others were not present when you discussed the operating agreement. [156]

A. That is correct. That is the first time the contract came to my attention or was handed to me was during that meeting.

Q. Who handed it to you?

A. As I said yesterday, I don't remember for certain whether Cecil Smith or Mr. Syme handed it to me, or whether it had been previously mailed to me, and when they got out here, we discussed it.

(Testimony of John Wight.)

It could have been mailed to me and then discussed after they got here. I did say yesterday, which is true, I have no recollection of ever discussing the Fidelity contract in the presence of the U. S. Geological Survey men, Mr. Duncan and Mr. Perrigo.

Q. But, are you sure that the contract came to you in its present printed form from a representative of Montana-Dakota Utilities or Fidelity Gas?

A. I am, definitely.

Q. Do you know whether the contract, as it now exists is one of the printed originals that was handed to you of Exhibit 2? Can you say whether, so far as the printed material is concerned, it is now the same as it was the first time you ever saw that contract?

A. To the best of my recollection, there was no changes made in this printed contract. I testified yesterday there had been some changes made in the printed unit agreement, but not in this. I did have their verbal promise to drill a second [157] well in Unit 5.

Q. That is not incorporated in here?

A. It is not incorporated in there.

Q. So that the contract, as it now stands, insofar as the printed portions are concerned, is exactly the same as it was when you first handed it or it was mailed to you by some representative of Montana-Dakota Utilities or Fidelity Gas, is that correct?

A. To the best of my recollection, I would say definitely, yes.

Q. As to the material that is typed in the operat-

(Testimony of John Wight.)

ing agreement—in the various operating agreements there are descriptions of property, are there not?

A. That is all, just the description of the property.

Q. And the names of the parties?

A. That's right.

Q. And executions, is that correct?

A. That's right.

Q. Do you recall any conversation with any representatives of Montana-Dakota Utilities or Fidelity Gas in which the manner in which this contract was prepared was discussed?

A. Read that question.

(Question read back by reporter.)

A. No.

Q. You don't recall any conversation as to who, I mean what [158] person actually prepared it?

A. No.

Q. When the contracts which you signed were executed, can you tell us who typed in the descriptions and names of the parties for whom you signed?

A. No, I don't know.

Q. Did you do it? A. No, I didn't.

Q. So, the contracts as you signed them were handed to you or mailed to you by the Montana-Dakota Utilities or Fidelity Gas in the form in which they were finally executed, is that correct?

A. That's right.

Q. With reference to the Exhibit 3, the Unit Agreement, I think you testified that there were

(Testimony of John Wight.)

some changes made in that agreement after it was first presented to you, is that correct?

A. There were quite a few changes made in that one.

Q. Did you yourself draft any of those changes?

A. No, but I was the one that insisted on the changes being made, and some of the changes I insisted upon were adopted.

Q. But you didn't actually write the language that was used in it?

A. No, I didn't write any of it.

Q. Do you know who did make those changes in the unit agreement? [159]

A. No.

Q. Were they done in your presence?

A. No.

Q. The meetings as to the unit agreement, as you have testified, were held here in Billings, is that right?

A. Yes. However, we did discuss the unit agreements at one or two meetings in Minneapolis.

Q. When the contract was submitted to you in the final form, the unit agreement, Exhibit 3, was that again delivered to you by somebody from Montana-Dakota Utilities?

A. I believe they were mailed to me, I am not sure, but they were either delivered or mailed to me by someone in the Montana-Dakota Utilities office.

Q. After you received the copies that were executed, subsequently executed, did you make any

(Testimony of John Wight.)

changes by interlineation or otherwise in the contract? A. No, none whatsoever.

Mr. Erickson: That is all.

Mr. Lamey: No further cross examination.

(Witness excused.)

Court: Court will stand in recess until five minutes after 11.

(10-minute recess.) [160]

W. B. HANEY

one of the plaintiffs, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Will you please state your name? A. W. B. Haney.

Q. Where do you live, Mr. Haney?

A. Fallbrook, California.

Q. And you are the W. B. Haney who is one of the plaintiffs in the action now before the Court?

A. Yes.

Q. And in the complaint, in causes of action number 11 and 12, you are alleged to be the owner of certain interests in certain leases described in those two causes of action. Have you disposed of those interests since the commencement of this action? A. No.

Q. So whatever interest you had at the time the action was commenced, you still have, is that correct? A. I do.

(Testimony of W. B. Haney.)

Q. Mr. Haney, how early did you begin to acquire any interests in the Cedar Creek field?

A. I believe it was in 1934, 1934 or 1935.

Q. And since that time have you continued to have interests [161] in the Cedar Creek area?

A. How is that?

Q. And since that time have you continued to have interests in the Cedar Creek field? A. Yes.

Q. Mr. Haney, you were not a signer of Exhibit 2, which is the Fidelity agreement, were you?

A. No.

Q. The interests that you have that are under that agreement, you acquired subsequent to the 7th of February, 1935, is that correct? A. Yes.

Q. Now, the properties described in the complaint are in Unit 5 of the Cedar Creek field, are they not? A. I believe so.

Q. And they have produced, insofar as the Judith River sands are concerned, under the unit agreement with the Montana-Dakota Utilities Company, is that correct? A. I think it is.

Q. Now, are you still the owner of the interests in the lands described insofar as the Judith River sands are concerned? Do you still own the Judith River sands in the properties described in Unit 5?

A. No, that is sand—we sold the interest in the top sands, Judith River—I am not familiar particularly with the names of [162] the sands—the upper sands, we sold the gas interest in the upper sands.

Q. To whom did you sell those interests?

(Testimony of W. B. Haney.)

A. Montana-Dakota Utilities.

Q. I hand you a document marked Plaintiffs' Exhibit 24, and will ask you if that is the agreement under which you sold your interests in the Judith sands, the upper sands, to the Montana-Dakota Utilities Company? A. It is.

Mr. Erickson: We now offer Plaintiffs' Exhibit 24.

Mr. Lamey: No objection.

Court: Admitted.

(Plaintiffs' Exhibit 24 admitted in evidence.)

Q. So that by reason of this agreement, you are not in this action claiming any rights as to the Judith River sands, they being the upper sands in the area described in which you claim an interest in the complaint?

A. I have no interest in the upper sands.

Q. Now, after the making of the agreement of the 16th day of June, 1952, which is Plaintiffs' Exhibit 24, who was paying the rentals and royalties on the lands in which you claim an interest in the complaint?

A. I presume the Montana-Dakota Utilities. I am not paying them.

Q. Do you recall that the contract provides they are to pay [163] the leases and rentals?

A. That's right.

Q. Now, this contract bears date the 16th day of June, 1952. With whom was the contract negotiated? A. Do you mean as to selling the sands?

Q. Yes. A. Montana-Dakota Utilities.

(Testimony of W. B. Haney.)

Q. I mean who were the men involved, was it Cecil Smith?

A. Cecil Smith and Mr. Johnson called at my place.

Q. At the time the contract was negotiated, Exhibit 24, was there any discussion between you and Mr. Smith and Mr. Johnson as to the sands other than the Judith River sands?

A. That we still held our interest in the lower sand below the Eagle, what they called the Eagle sand or Eagle River sand.

Q. The top sand is Judith and the second sand is Eagle, is that correct? A. That's right.

Q. Are they both above 2,000 feet?

A. We were to retain all interest below the 2,000 foot, or the Eagle sand.

Q. Were you to retain the Eagle sands?

A. No.

Q. Having in mind that the upper sand is the Judith sands, did you sell anything but the Judith sands? [164]

Mr. Lamey: Counsel, I think the agreement speaks for itself. We will just get confused. I object to this line of testimony.

Court: Yes, I think so.

Mr. Erickson: I am in full agreement.

Q. You have just testified that in the conversation at the time you negotiated this agreement, it was stated to you that the agreement didn't affect your rights in the other sands than those covered in this agreement, is that correct?

(Testimony of W. B. Haney.)

A. That's right.

Q. At the time of this discussion, which was in June, 1952, was any mention made by either Mr. Smith or Mr. Johnson to you of the existence of the Fidelity agreement, which is the agreement here under consideration? A. Not that I recall.

Q. Are you the owner of interests in the Cedar Creek area other than those involved in Unit 5 and in this lawsuit?

A. I have some interest in, I believe what they call Unit 3 of Cedar Creek; I have a small undivided interest.

Q. Is that up in the general vicinity of where Shell has been drilling wells in the last few years?

A. Yes, sir.

Q. Was there any agreement made under which you ratified, as to your interests, the agreement that exists between Shell Oil Company and Montana-Dakota Utilities Company as to that [165] tract?

A. That particular tract, I signed a lease to a Shell representative who called at my place getting the leases on this one particular tract.

Q. Do you know whether that tract was covered by one of these Fidelity agreements?

A. No, I don't.

Q. I hand you Plaintiffs' Exhibit 25, and ask you if that is the agreement which you ratified at the behest of the Shell people? A. It is.

Mr. Erickson: We now offer Plaintiffs' Exhibit 25.

Court: Any objection?

(Testimony of W. B. Haney.)

Mr. Lamey: No objection.

Court: It is admitted.

(Plaintiffs' Exhibit 25 admitted in evidence.)

Mr. Erickson: Counsel are agreeable to stipulating that Plaintiffs' Exhibits 26, 27 and 28 may be admitted.

Court: Very well, they are.

(Plaintiffs' Exhibits 26, 27 and 28 admitted in evidence.)

Mr. Lamey: I think we should add to the stipulation, if you will that those were sent by Cecil W. Smith, Vice-President of Montana-Dakota Utilities Company, and received by the witness W. B. Haney.

Mr. Erickson: May we, in order to avoid putting in the [166] documents for each one, stipulate now that similar letters were sent to H. C. Smith, Susan Wight, International Trust Company and Cedar Creek Oil and Gas?

Mr. Lamey: Yes.

Court: Very well.

Q. These letters, Mr. Haney, are dated, the first one, April 27, 1951, from Cecil W. Smith, telling of the making of the agreement between Montana-Dakota Utilities and the Shell Oil Company, which, I believe, is Exhibit 5; the one of July 23, 1951—no, I am in error there. The first letter, Mr. Haney, of April 27th, tells of Shell's activity in drilling wells, is that correct?

A. I think I received that.

Q. And the second one, I can advise you, Mr.

(Testimony of W. B. Haney.)

Haney, is the one announcing the completion of the operating agreement between Shell and Montana-Dakota Utilities, dated July 23rd, and the one of December 23, 1952, reports on the drilling of wells in the Pine Unit and in the Little Beaver Unit.

Mr. Johnson: May I suggest that the letter of April 27, 1951 also tells of the execution of the operating agreement with Shell?

Mr. Erickson: The record shows that the first letter also tells of the making of the agreement between Shell and M.D.U.

Q. Now, prior to the receipt of these letters, [167] Mr. Haney, from the time you acquired the interests that are described in the complaint and covered by these stipulations, had you ever received any reports or any correspondence of any kind from Montana Dakota Utilities or Fidelity Gas reporting as to the drilling of any test wells to the horizon below 2,000 feet?

A. Not that I can recall.

Q. Did you ever have any communication from them, oral or otherwise, in the period prior to the letter dated April 27th indicating to you that they claimed any interests in the deep sands below the 2,000 foot level?

A. I don't recall talking to them or having any communication whatever.

Q. Is the letter of April 27th the first statement you had from them that they claimed any rights below the 2,000 foot horizon?

(Testimony of W. B. Haney.)

A. So far as I know, it is, to the best of my memory.

Q. Did you know, prior to the receipt of the letter of April 27, 1951, that Fidelity Gas was claiming any rights to the lower sands in the lands covered in the complaint?

A. No. I knew there was an agreement; I took the lands subject to whatever some agreement was. I didn't know what it was. I never saw the copy until the later years.

Q. Had you yourself ever made any attempt to lease or sublet or enter into an operating agreement [168] for the development of the sands below 2,000 feet prior to April, 1951? A. No, I haven't.

Q. Did you have any understanding with John Wight that he was authorized to lease your properties?

A. Yes, I authorized John, told him any time he could get anyone interested to drill it, I would put my land in with what he could get on a deal that would be suitable for him, I thought it would be suitable for me.

Q. You have been down in the Baker field, have you not, on a number of occasions? A. Yes.

Q. And have you been on your properties in Unit 5 on those occasions? A. Yes.

Q. When was the most recent?

A. Oh, I believe 1938, 1938 was the last time I was out there.

Q. And at that time, was there any oil well in existence on any of your lands? A. No.

(Testimony of W. B. Haney.)

Q. And do you know whether there is one now?

A. No, I don't.

Q. Have you ever received any royalty?

A. You are speaking of this now? On Unit 3 Shell has production on Unit 3. You are speaking of Unit 5? [169]

Q. I am speaking of Unit 5.

A. I don't know if there is any on there, I wouldn't know, I haven't been on there for years. I am not getting any checks.

Q. Since the time you made the agreement selling your Judith River sands, have you had any negotiations with any representatives of the Shell Oil Company with relation to your deeper sands in the properties described in the complaint?

A. I don't just get the question. Would you ask that again?

(Question read back by Reporter.)

A. No, I think not.

Q. I believe in your deposition, Mr. Haney, you stated you had some discussion, not with Mr. Coye, but with some Shell representative, in which the matter of gross payments rather than net were discussed?

A. That was in leasing. I told the representative who called on me that I would sign the lease on this small interest up there because it was separate from the other, but I would not sign any lease on the larger holding, other holdings I had, where it was a net proposition, that I wanted gross, I wanted to know what I was getting.

(Testimony of W. B. Haney.)

Q. You were specifically discussing the lands in Unit 5, is that correct? A. Yes.

Q. Did anything come of those negotiations, [170] did you arrive at any agreement? A. No.

Mr. Erickson: That is all.

Cross Examination

Q. (By Mr. Lamey): Mr. Haney, when was the last discussion you just referred to, when Shell talked to you about some small interest you had in another portion of the Cedar Creek Anticline?

A. You have the date on the lease there, at the time we signed that lease you just showed me.

Q. It appears to be January 10, 1953, when you signed this confirmation of deep test operating agreement which has been marked Exhibit 25.

A. If that is the date of the lease, that is the last and only time I discussed it with him.

Q. Have you finished with that?

A. Yes.

Q. If you don't hear me, let me know.

A. I am hard of hearing, and my hearing aid isn't working very good.

Q. Can you hear me all right?

A. Yes, I hear you now.

Q. When you acquired your interests in these lands in Unit 5, did I understand you to say that there was some reference in [171] the documents you received to the Fidelity operating agreement?

A. I took them subject to the agreements that

(Testimony of W. B. Haney.)

had already been signed. I didn't join in signing any agreements I bought the land subject to.

Q. Mr. Haney, do you recall having received a letter dated April 3, 1952, from Cecil W. Smith in which he enclosed a copy of the Fidelity operating agreement? A. No, I don't recall it.

Q. I will get your deposition if you like, but I will just refer this to you, and maybe it will bring it back to your mind. When we took your deposition on April 9, 1953, in Los Angeles, a question was asked, "In addition to those letters, you received a letter of April 3, 1952—" right down there near the bottom, about two-thirds of the way down. Do you find it where I started to read?

A. I don't recall them; I may have received them.

Q. I know you may have forgotten about it. I want to call your attention to this and see if we can straighten it out. I am calling your attention to page 16, a question beginning, "In addition to those letters, you received a letter on April 3, 1952, from Mr. Cecil W. Smith, which enclosed a copy of the Fidelity Operating Agreement, which is called Form 247, did you not? Answer, Yes, that is what I produced, isn't it? Question, Yes, that is a part of the file you brought in now, [172] and Mr. Smith's letter advises you your lands were included in that agreement, did it not? Answer——"

Mr. Erickson: May I stipulate that that occurred?

(Testimony of W. B. Haney.)

Mr. Lamey: Yes, I am trying to be fair to the witness.

Q. "Answer, I don't recall that, Mr. Johnson, it probably did. I received that letter."

A. I brought the letter in with the file.

Q. At that time you brought into the Notary Public before whom the depositions were being taken a file, and in that file was a copy of this Fidelity operating agreement. Do you recall that?

A. Yes, I do now, sir.

Q. As a foundation for your titles to these interests in Unit 5, am I correct in understanding that it is Government leases?

A. The Government leases, yes.

Q. Mr. Haney, I am now showing you Exhibit 19, and I will ask you if that is your signature on the bottom? A. That is my signature.

Q. When Mr. Johnson and Mr. Smith saw you in May, I believe, of 1952, just prior to the time you sold these interests in the upper sands, do you recall that you then discussed the agreement that had been made with Shell to operate under these agreements in the Cedar Creek Anticline?

A. No, I don't recall discussing any agreements that they [173] had made. The only thing I was interested in was the selling.

Q. Do you not recall that a copy was given to you of that operating agreement with Shell at that time?

A. Yes, Mr. Smith left a copy of that agreement with me at that time.

(Testimony of W. B. Haney.)

Q. That was sometime in May, 1952, was it not?

A. Yes.

Mr. Lamey: That is all.

Redirect Examination

Q. (By Mr. Erickson): Mr. Haney, when you testified that you took the properties involved subject to the operating agreement, Exhibit 2, had you seen the operating agreement at the time you made the purchase? A. No, I hadn't.

Q. Did you know whether or not the agreement was in force at the time you purchased?

A. No, I don't.

Q. There is one matter I overlooked on direct. It may not be proper cross examination, but I don't believe counsel will object if I ask Mr. Haney whether there is any other agreement between Mr. Haney and Mr. Wight than the one contained in Defendants' Exhibit 19?

A. That is the only agreement that I have with Mr. Wight. [174]

Mr. Erickson: That is all, Mr. Haney.

Mr. Lamey: That is all.

(Witness excused.)

H. C. SMITH

one of the plaintiffs, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Your name is H. C. Smith? A. Right.

(Testimony of H. C. Smith.)

Q. Where do you reside, Mr. Smith?

A. Whittier, Los Angeles County, California.

Q. In what business are you engaged?

A. The manufacture of drilling bits for the production of oil and water.

Q. And you have also some interest in oil and gas leases, is that correct, and potential oil and gas leases?

A. Yes, sir.

Q. How extensive is that?

A. Are you speaking of this property in Montana?

Q. No, I mean generally. It is a background question, Mr. Smith.

A. I own quite a bit of land at different places.

Q. Now, you are one of the plaintiffs in [175] this action, are you not?

A. That's right.

Q. And in the complaint, we have described certain lands in our causes of action 9 and 10, which, by the complaint, you claim to hold an interest in.

A. Yes.

Q. Have you the same interest in those lands now you had at the time the complaint was prepared?

A. Yes.

Q. Did you also enter into an agreement with the Montana-Dakota Utilities Company on the 12th day of June, 1952, under which you sold your interests in the Judith sands in the lands covered by the complaint?

A. I did.

Mr. Erickson: It may be stipulated, I believe, between counsel that Exhibit 29 may be admitted as

(Testimony of H. C. Smith.)

the agreement under which Mr. Smith sold his interest in the Judith sands?

Mr. Lamey: It may be stipulated.

Court: Very well.

(Plaintiffs' Exhibit 29 admitted in evidence.)

Q. So in this action, Mr. Smith, you are claiming no interest in the Judith sands insofar as this property is concerned, is that correct?

A. Correct.

Q. Since the making of the contract, Exhibit 29, who has paid the rentals and royalties on the lands of yours described in [176] the complaint?

A. Since I sold?

Q. Yes.

A. Well, Montana-Dakota Utilities, I understand.

Q. At least, you have not paid them?

A. No, I haven't.

Q. There have been admitted in evidence, Mr. Smith, three letters which were addressed to W. B. Haney, Exhibits 26 and 27 and 28, and it has been stipulated by counsel that you also received similar letters, that is correct, is it not?

A. I would think so.

Q. Signed by Cecil Smith? A. Yes.

Q. Prior to the receipt of those letters, and from the time you acquired the properties described in the complaint, had you ever received any communication from Fidelity Gas Company or Montana-Dakota Utilities Company having to do with the sands below 2,000 feet in your property?

(Testimony of H. C. Smith.)

A. No.

Q. Had you ever had any discussion with any representatives of either company about the lands below, or the sands below 2,000 feet prior to the receipt of the first letter of April 27, 1951?

A. Not that I remember.

Q. Have you received any income by way of [177] royalties from the production of oil from any of the lands covered in this complaint? A. No.

Q. Mr. Smith, I hand you one of the printed copies of Exhibit 2, the operating agreement, and will ask you if you can recall when you first saw such an agreement?

A. Well, I couldn't, I don't remember when I first saw that.

Q. With relation to the time you sold your gas in the Judith sands, or the Judith sands to Montana-Dakota Utilities Company in June of 1952, could you fix any time when might have first seen this operating agreement? Does that refresh your recollection at all?

A. Well, I just don't remember when I seen it.

Q. Now, at the time of the negotiations that resulted in the sale of the Judith River sands, the situation is the same as with W. B. Haney, Mr. Cecil Smith and Mr. Armin Johnson were the representatives of Montana-Dakota Utilities Company, were they not?

A. As I remember, we met at Mr. Haney's home.

Q. So, the discussions were held with you and Mr. Haney and the other two gentlemen present?

(Testimony of H. C. Smith.)

A. Yes.

Q. Was there also a gentleman by the name of Mr. Bewley present?

A. As I remember, I don't believe he was at Mr. Haney's home. [178]

Q. At the time of the negotiations for the sale of the Judith sands, was there any discussion of sands other than the Judith sands?

A. They assured me they would have no interest in any other than the upper gas sands.

Q. When you say "they", do you recall—

A. Cecil Smith and Mr. Johnson, as I remember.

Q. Did you subsequently carry on any negotiations with any representative of Shell Oil Company as to these sands other than the Judith?

A. Yes.

Q. When was that?

A. Well, it was sometime after I sold this interest, this gas interest to them.

Q. With whom were those negotiations carried on?

A. I believe the man's name was Coye, it sounded like that.

Q. How is that spelled?

Mr. Lamey: C-o-y-e.

Q. Do you know who Mr. Coye is?

A. I wouldn't know him if I would see him in the room.

Q. Did you know what his position was?

A. I think he was working with the Shell Company.

(Testimony of H. C. Smith.)

Q. Where did the discussion take place?

A. In my counsel, Mr. Prudohn's office, down in Los Angeles.

Q. What was the discussion? [179]

Mr. Lamey: Counsel, fix the date. This date was when? I didn't hear.

Q. About what was the date of that, can you fix that? You say it was after the time——

A. I would say it was probably 1953 sometime.

Q. It was after you sold the Judith sands, is that correct? A. Correct.

Q. What was that discussion?

A. Well, I know we talked about the fact that I objected to receiving a gross income.

Q. You mean gross or net?

A. I wanted a net income, five percent.

Q. I believe that is gross, is it not?

A. Maybe it is, I don't know whether you call it gross or net.

Q. You wanted a certain percentage of production without any deduction of the costs of operation?

A. Yes, it seemed like the costs of operation, they would eat up all the money I would have, that is, I am thinking now of Montana-Dakota Utilities Company.

Q. Did the negotiations result in any agreement between you and Shell? A. No, they didn't.

Mr. Erickson: That is all. [180]

(Testimony of H. C. Smith.)

Cross Examination

Q. (By Mr. Lamey): It is in the record, but just for the purposes I have now, do you recall whether you acquired some interest from Mr. Haney in these lands about November 20, 1940?

A. Well, I acquired some from Mr. Haney. I don't know the date.

Q. It was quite sometime ago, was it not?

A. Pardon?

Q. It was quite sometime ago, was it not?

A. Yes.

Mr. Erickson: With the permission of counsel, I would like to reopen for the purpose of putting in two more exhibits.

Court: Very well.

Mr. Erickson: May it be stipulated that Plaintiffs' Proposed Exhibit 30, entitled "Cancellation Notice," bearing apparently the signature of Mr. Smith, Mr. Herman Smith, and Plaintiffs' Exhibit 31, which I believe we can agree was signed by Mr. Cecil Smith, a letter, be admitted. I believe counsel has assented to the stipulation, is that correct?

Mr. Lamey: Yes.

Court: Very well, they are admitted.

(Plaintiffs' Exhibits 30 and 31 admitted in evidence.)

Mr. Erickson: That is all I have.

Cross Examination—(Continued)

Q. (By Mr. Lamey): Mr. Smith, I show you what has been marked as Exhibit 30, [181] this no-

(Testimony of H. C. Smith.)

tice of July 16, 1951, I will ask you who prepared that for you, either it or the form from which it was taken?

A. Well, I believe it was John Wight and my attorney, Mr. Prudohn; that is my best remembrance.

Q. I am showing you now Exhibit 18, and I will ask you if that is your signature with John Wight's on the document? A. That is my signature.

Q. You have testified with reference to Exhibit 29, which is the agreement of June 12, 1951, for the sale of certain gas lands that was executed on that date, do you want to see it? A. The sale?

Q. Yes, the sale of the gas lands?

A. I wouldn't say to that, no, I don't think it was consummated on that date, I don't believe, maybe it was.

Q. June 12, 1951, is that correct?

A. That is what this document states here, June the 12th.

Q. Now, there has been introduced in evidence one copy, but at that same time, did you not execute five copies or five agreements altogether covering all of your interests in the Judith gas sands in Unit 5?

A. Well, whatever was necessary to make the sale.

Mr. Erickson: We are willing to stipulate that agreements were executed, on your say-so, five, which resulted in the disposition of the Judith River sands interest in all of the [182] lands de-

(Testimony of H. C. Smith.)

scribed in the complaint of H. C. Smith, or in which he claimed an interest in Unit 5.

Mr. Lamey: And that there may be more than just the one that was introduced in evidence as Exhibit 29?

Mr. Erickson: Yes, with the further understanding, not having seen the other ones, that the others are identical except for the description of the properties and the contracts.

Q. When was the discussion that you referred to with Haney, Armin Johnson and Cecil W. Smith in California?

A. The date of it?

Q. Yes, sir.

A. I don't recall the date.

Q. Was it shortly before this agreement of June 12, 1951, was made, 1952, I am sorry?

A. I don't remember.

Q. Did you have more than one conversation or discussion with Smith and Johnson pertaining to this matter?

A. Well, I think I did with Mr. Johnson. I don't know whether I did with Mr. Smith. That is just as I remember it.

Q. Do you recall a meeting at the office of your attorney, Mr. Prudohn?

A. Yes, I think we met over there.

Q. Who was this Mr. Bewley who you said might have been at the Haney home?

A. I don't think he was there. [183]

Q. Who is that person?

A. He is an attorney there in Whittier.

(Testimony of H. C. Smith.)

Q. At that time, did he represent you in this or other meetings? A. Not that I recall.

Q. Well, now, at one or the other of those conversations, did you not discuss the Shell operating agreement and see a copy that was left with Mr. Haney and you by Cecil W. Smith?

A. No, I think I received a letter from Cecil Smith in regard to the deal he had made with the Shell Company.

Q. And when was that?

A. I think it is in evidence there. It would state on there. I don't remember the date.

Q. You haven't been shown such a letter since you took the stand here, have you?

A. What letter is that?

Q. Well, the one you say you think you received from Cecil Smith with reference to the Shell operating agreement?

A. I thought I looked over the letters that Mr. Haney received there; I thought I looked over the letters Mr. Haney received.

Mr. Erickson: I object to the question as not a proper statement of the evidence.

Court: Counsel introduced some letters addressed to Haney and signed by Smith, and it was [184] stipulated similar letters were sent to H. C. Smith.

Mr. Erickson: I may be in error, your Honor, but I think they are talking about a different letter which was supposed to have accompanied a copy of the agreement. If I am wrong on that, I with-

(Testimony of H. C. Smith.)

draw my objection. I thought they were referring to a different letter.

Mr. Lamey: I am trying to find out from the witness if he did not receive from Cecil Smith at the time of these conferences a copy of the Shell Operating Agreement, dated April 10, 1951.

A. I don't remember that I received it at these conferences, no.

Q. Did you see it at the conferences?

A. I don't even know whether I saw it there or not.

Q. Do you not remember there was considerable discussion about the agreement and the conditions and terms of it.

A. I don't remember that at that time, no.

Q. Now, you say that at least, at these conferences, you were assured that Smith and his company would not claim any interest in the horizons below the Judith, is that correct?

A. Yes, I remember that.

Q. Who told you that?

A. As I understand, it was Mr. Johnson and Mr. Smith.

Q. In other words, at that time, you were only selling your rights in the upper sands? [185]

A. That is correct.

Q. Mr. Smith, to go back to this conversation at the Haney home, and on page 68, near the bottom, after some reference was made to this meeting at the Haney home, the question was asked of you, "You do have some recollection, do you not, that

(Testimony of H. C. Smith.)

there was a discussion about the operating agreement with Shell Oil Company," to which you answered "Yes." Now, did you so testify when your deposition was taken in Los Angeles April 9, 1953?

A. I apparently did, yes.

Q. Does that help you refresh your memory now?

A. I must have thought I had at the time, but I had forgotten anything about it since.

Q. On the next page, 69, at the top, "Question, And that you and Mr. Haney inquired about the development Shell Oil Company was carrying on under that agreement? Answer, I know we had some conversation in regard to it, but as far as the operating agreement, under that, I don't remember it. Question, You recall there was some conversation about the fact you would receive 25 percent of the net profit from the Shell Oil Company operations, do you remember that? Answer, Yes, I do." Did you so testify when your deposition was taken?

A. I apparently did according to this document here.

Court: Well, I think we had better recess, or are you about through? [186]

Mr. Lamey: I am about through, and counsel would like to get this witness through.

Mr. Erickson: We have agreed both Mr. Smith and Mr. Haney could be excused after we have completed with him. It shouldn't take very long.

Q. Mr. Smith, in connection with your statement that you were assured that Mr. Smith's com-

(Testimony of H. C. Smith.)

panies were making no claim to horizons below the Judith River sand, I would like to direct your attention to Paragraph 6 of Exhibit 29, on page 4. Will you read that, please, so you will refresh your mind?

A. I am reading it. Do you want me to read it out loud?

A. No. I call your attention, starting in the second sentence, to the effect, "Nothing in this agreement shall be construed to modify, restrict or impair such rights or the right of an operator authorized thereto pursuant to existing agreements to drill through the Judith River Sand into the deeper formations, but the operator shall case off the gas in said Judith River sand and take all reasonable precautions to protect the Judith River sand from being flooded or otherwise damaged by reason of the operator's drilling operations." Do you recall such provision in this agreement?

A. Yes, but they said they would have no rights to anything below the upper sand when they purchased this, and if some operator did, they would have to protect the gas as they went through. It don't say what operator or who. [187]

Q. When you bought these lands, you bought them subject to the Fidelity operating agreement and unit operating agreement?

A. I didn't buy them subject to that; I didn't know anything about that Fidelity operating agreement.

(Testimony of H. C. Smith.)

Q. Have you recently referred to the documents under which you acquired these interests?

A. I have read over this file of the agreement, if that is what you mean.

Q. Pardon.

A. I have read over this agreement.

Q. No, the agreements under which you acquired your interests, those, for instance, from Harry A. Smith, to refresh your memory as to whether or not those are specifically subject to the Fidelity operating agreement and the gas unit agreement?

Mr. Erickson: To which we object because the instruments are in Court, and are exhibits and speak for themselves.

Court: He is just asking him. He now says he didn't buy it subject to them.

Mr. Erickson: I withdraw the objection.

A. As I recall, I didn't study them over at the time.

Q. Did you have an attorney representing you at the time? A. Not when I bought it.

Court: It doesn't make any difference. Have you got the exhibit, it is in evidence. Is reference made [188] to the Fidelity agreement in the exhibit?

Q. From whom did you receive that Exhibit 29, the agreement to purchase the Judith sands, or to get more specific, did you not receive that from your attorney, Mr. Prudohn?

A. What was that?

Q. The Exhibit 29, which is the agreement to purchase the gas rights in the Judith River sands,

(Testimony of H. C. Smith.)

did you not receive that through your attorney, Mr. Prudohn? A. I don't know.

Q. I say did you not receive that agreement before you signed it through your attorney, Mr. Prudohn? A. I apparently did.

Mr. Lamey: That is all.

Redirect Examination

Q. (By Mr. Erickson): Mr. Smith, reference has been made to the contract, Exhibit 29, the contract under which you sold the Judith River sands, and particular attention was called to Paragraph 6 on page 4. Do you have gas wells in sands other than Judith, having reference to the Eagle sands?

A. I have heard about the Eagle sands, yes.

Q. Do you know whether there is any production from the Eagle sands in your properties?

A. I am not sure. [189]

Q. Subsequent to the making of the contract of June 12, 1952—and I believe the record should be corrected, Mr. Lamey's questions referred always to the date as June, 1951——

Mr. Lamey: You are right, counsel. I looked at another note or agreement as of that date, 1951.

Mr. Erickson: So the correct date is June 12, 1952?

Mr. Lamey: Whenever I made reference to Exhibit 29, it should have been June 12, 1952.

Q. After the date, or about the date of that contract, was there any proposal made to you by

(Testimony of H. C. Smith.)

the Montana-Dakota Utilities Company that the Eagle sands be committed to a unit agreement?

A. Yes, as I remember, there was.

Q. Did you, in response to those negotiations, write a letter to the Montana-Dakota Utilities Company?

A. Yes, sir.

Q. I show you a document marked Plaintiffs' Exhibit 32, which is a photostat of a letter dated April 18, 1952, and I may say for your information, Mr. Smith, that that is attached to your deposition in California, and you recall that instrument, do you?

A. Yes, sir.

Q. That is a copy of the letter which you sent to the Montana-Dakota Utilities Company, is it not?

A. That's right.

Mr. Erickson: We offer Plaintiffs' Exhibit 32.

Mr. Johnson: We object to the introduction in evidence of Plaintiffs' Exhibit 32 for the reason it is incompetent, irrelevant and immaterial, it is relating entirely to the cooperative or unit plan of development with reference to the Eagle sand which was then under consideration, and which is not within any issues of this case. The letter is wholly self-serving, and will not serve to prove or disprove any issue in this case.

Court: What is the purpose?

Mr. Erickson: There are two purposes, one of them is to show, to corroborate what Mr. Smith said as to the statements of Smith and Johnson to the effect they were claiming no interest as operator or otherwise in any sands other than the Judith.

(Testimony of H. C. Smith.)

This would tend to show that sort, or some sort of agreement was sought by them with Mr. Smith, at least as to Smith's lower sands; and also for the purpose of showing the effect of the unit option provision of the contract which is the unit agreement, Exhibit 3.

Mr. Johnson: I can't see where it has any probative effect on any of that.

Court: I don't see how it can affect the interpretation of Exhibit 3. It is the same proposition we have gone through before. It would be Smith's idea as to what the unit agreement provides, but for the other purpose, I will admit it.

Mr. Erickson: That is all I have.

(Plaintiffs' Exhibit 32 admitted.) [191]

Mr. Lamey: No further cross examination.

(Witness excused.)

Mr. Erickson: May it now be stipulated that Mr. H. C. Smith and Mr. W. B. Haney may be excused from further participation as witnesses in this proceeding?

Mr. Lamey: Yes, your Honor.

Court: Very well. Court will stand in recess until two o'clock.

(Noon recess.)

THOMAS A. JIRIK

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Will you please state your name? A. Thomas A. Jirik.

Q. Where do you reside, Mr. Jirik?

A. Faribault, Minnesota.

Q. What is your business, Mr. Jirik?

A. Production of oil and natural gas and drilling oil and gas wells.

Q. What, if any, position do you hold with the plaintiff Cedar Creek Oil and Gas Company?

A. President and General Manager. [192]

Q. How long have you held that position?

A. From the inception of the company with the exception of the first 10 months of 1926.

Q. So that after that date, you have continuously been President and General Manager of Cedar Creek Oil and Gas Company, is that correct?

A. Without interruption.

Q. The home offices are at Faribault, Minnesota, of that corporation, is that correct?

A. Yes, sir.

Q. Does it have properties any place but the Cedar Creek Anticline in Montana?

A. They have in Texas and Oklahoma, yes.

Q. For the last several years, where have you put in most of your time in connection with Cedar Creek's operations?

A. Mostly in Oklahoma, and some in Texas.

(Testimony of Thomas A. Jirik.)

Q. Who is actively in charge of the office of your corporation when you are not at Faribault?

A. Mr. Seivers, our Secretary-Treasurer.

Q. Mr. George Seivers, is that right?

A. Yes.

Q. He has charge of the records and files of the corporation, is that true?

A. Yes, sir.

Q. Now, Mr. Jirik, your corporation is one of [193] the plaintiffs in this action, and the properties which you claim in the complaint are described in the first and second causes of action. Has any change taken place in your interest in that property from the date the complaint was filed until today? A. No.

Q. So whatever interest you had when the complaint was filed, you still retain, is that correct?

A. Yes, sir.

Q. How long have you been familiar with the Cedar Creek Anticline? A. Ever since 1928.

Q. Is that when you started, or your company started acquiring interests in that field?

A. That is when we started drilling the first well.

Q. Did your company itself drill wells?

A. Yes, sir.

Q. Where were they?

A. They were right north of Baker.

Q. In the area of the present Unit 5?

A. Yes, sir.

Q. What kind of wells were those?

(Testimony of Thomas A. Jirik.)

A. They were all good wells with the exception of Number 1, which was drilled close to the Carbon Black plant. The second well was drilled on a Government permit about four and a half miles northwest of town. [194]

Q. Those were gas wells?

A. We didn't get anything else up there but gas.

Q. Your wells were drilled to the Judith sands, is that correct? A. Yes, sir.

Q. How many wells did you have drilled in Unit 5 prior to the time of the making of the unit agreement, which is Exhibit 3 in this proceeding?

A. Well, since the agreement of the unit plan—all the wells we had were drilled prior to the making of the agreement on the unit operation of the first gas field.

Q. Do you now recollect how many of them there were? A. Six.

Q. Did you have any part in negotiating the contract which is Exhibit 3 here, the unit plan for Unit 5? A. No.

Q. You signed the contract for the Cedar Creek Oil and Gas Company, did you not?

A. Yes, sir.

Q. You were the one that had any discussions there were in connection with that agreement, is that correct?

A. Yes, discussion was held on the agreement. However, to us it came quite a bit later than it did to some other operators. We were the last ones that were given the agreement to sign so far as I know.

(Testimony of Thomas A. Jirik.)

Q. Can you tell us the circumstances under which the agreement was signed?

A. Well, the agreement, as it was signed, was signed under protest by our Board of Directors.

Q. What do you mean by that?

A. They wasn't satisfied with it, but——

Mr. Lamey: Object to that as incompetent, irrelevant and immaterial. The agreement has been executed, and what transpired on the Board of Directors is hearsay as to the defendants in this case.

Court: Yes, I think the objection is good. I will sustain the objection.

Q. Were there any discussions between you and any representatives of the Montana-Dakota Utilities Company concerning the terms of the agreement, which is Exhibit No. 3, the unit agreement?

A. Yes, mostly with Mr. Smith and Syme, Attorney Syme.

Q. And he is the Alger Syme that has been identified heretofore? A. Yes.

Q. Where did the discussions take place?

A. In the office of Montana-Dakota Utilities Company, Minneapolis.

Q. And was there a discussion at that time of the terms of the agreement? [196]

A. Well, we were frankly told——

Mr. Lamey: Pardon me, I would like to have that answered yes or no.

Court: Yes, answer it yes or no.

A. What was the question?

(Question read back by reporter.)

(Testimony of Thomas A. Jirik.)

Q. Answer that yes or no, Mr. Jirik.

A. Was there a discussion?

Q. Yes. A. Yes.

Q. Who was present when there was a discussion? A. Mr. Smith and Mr. Syme.

Q. That is Cecil Smith that has been identified here? A. Yes, sir.

Q. Do you know about when that discussion took place?

A. Prior—right in January of 1935.

Q. Was there anyone else present beside you three? A. Not in Minneapolis.

Q. Now, what was the discussion or the negotiation that occurred at that time between you three?

A. Well, they were unitizing the field, and we had nothing in the north end, but we did have one piece which we had an interest in in Unit 4, and most of our stuff is in Unit 5, and some in Unit 6, and at the time before the contract was signed, both Mr. Syme and Mr. Smith told me themselves [197] that it is the same contract for everybody in the field.

Q. Did you have then a contract submitted to you by Mr. Smith and Mr. Syme? A. Yes.

Q. And is it the printed contract that is now in existence as to Unit 5? A. Yes.

Q. Defendants' Exhibit 3 is the contract, I believe, which was between your company and the Montana-Dakota Utilities Company?

A. That's right, that was signed by our secretary.

(Testimony of Thomas A. Jirik.)

Q. A little louder.

A. That was signed by myself as President and Robert Basching, our Secretary at that time, and Mr. Heskett, and whose is this name, I don't know.

Q. It is one I have never been able to figure out either. Now, when did you first see this contract, Defendants' Exhibit 3?

A. At Syme's office in Minneapolis.

Q. And under what circumstances did you see it, did he present it to you? A. Yes.

Q. Do you know who prepared it?

A. I believe it was prepared in the office of Montana-Dakota by Mr. Syme, and maybe somebody helped him, I don't know. [198]

Q. You didn't prepare it?

A. No, we didn't prepare it.

Q. Was there a discussion, was there a detailed discussion of the various provisions of the contract prior to the time you signed it?

A. Yes, there was.

Q. Were there any changes made in the contract as a result of those discussions? A. No.

Q. And the contract as it now appears in the form shown in Defendants' Exhibit 3 is the contract you say you signed there, is that correct?

A. That's right, they claimed they had everything ironed out——

Mr. Lamey: Just a minute, I object to that as not responsive, and ask it be stricken.

Mr. Erickson: I believe it is part of the gen-

(Testimony of Thomas A. Jirik.)

eral discussion that took place, and the officers of the corporation are being quoted.

Court: What was the question?

(Question and answer read back by reporter.)

Mr. Lamey: From there on I move it be stricken as not responsive.

Court: Overruled.

Q. Was any statement made to you that others [199] had agreed to this contract?

A. I was told by Cecil Smith everybody agreed to the same thing for everyone. Then I didn't question anything because I knew the N. P. had a lot of land in there, and if it was good for the N. P., it was good for everyone else.

Q. Similar agreements were signed as to other tracts of your land, that is, you signed more than one of these, did you not? A. Yes, sir.

Q. Showing you Defendants' Exhibit 2, which is designated Operating Agreement, it has been variously referred to as the deep test agreement, did you negotiate the making of that contract on behalf of the Cedar Creek Oil and Gas Company?

A. No.

Q. I notice it bears your signature. Can you tell us the circumstances under which the contract was signed?

A. All were signed under the same circumstances.

Q. What does that mean?

A. Well, there was nothing else we could do,

(Testimony of Thomas A. Jirik.)

there was no other market for the gas. In order to sell any gas, that was our only out, the same as anybody else.

Q. I am now referring to the deep test agreement, which bears a date later than the Unit 5 agreement. A. Yes.

Q. Having in mind this is the agreement which [200] covers the testing of the deeper sands, can you tell the circumstances under which that contract was signed, that is, as to any discussion that preceded the signing?

Mr. Lamey: I would like to have the question read; I didn't follow it.

(Question read back by reporter.)

Mr. Lamey: I thought the witness had already answered that.

Mr. Erickson: I believe he was confused as to the contracts.

Court: The objection is overruled. Proceed and answer the question.

A. Well, that was signed with the same objection as the first unit plan.

Q. That isn't quite responsive to my question. When did you first see this agreement?

A. In the office of Montana-Dakota.

Q. And was there *there* present at that time the same two gentlemen you have referred to on the other?

A. The first time there was only Alger Syme. He apprised me of the agreement in the making, and that is where I saw it first.

(Testimony of Thomas A. Jirik.)

Q. Alger Syme told you about the preparation of this agreement before it was actually completed?

A. Yes, sir. [201]

Q. And did he indicate to you who was preparing the agreement? A. No, I never asked him.

Q. When did you first see the agreement, Exhibit 2?

A. Well, that came along, I don't remember the date, but that came along later than the unit plan.

Q. And can you say under what circumstances you first saw the agreement?

A. Well, the same circumstances as I just mentioned.

Q. That would be in the offices of Montana-Dakota Utilities Company?

A. Yes, at the time——

Mr. Lamey: May it please the Court, I object to this repetition, going over and over, the witness has already answered, and I would like to have an opportunity to have the questions so framed that I can object and try to simmer out here what is just conversation before the agreements were executed, and what pertains to circumstances.

Court: Yes. I do think it is not counsel's fault. I think the witness is not answering the question. Pay particular attention to the question that is asked, and then direct your answer specifically to that question. Counsel will think of other questions to ask you.

Q. I am trying to get from you, Mr. Jirik, the situation when you first saw this agreement, where

(Testimony of Thomas A. Jirik.)

[202] you first saw it, and who was present, and the approximate time. Can you tell us that?

A. I cannot tell you the time, but I know it was in Alger Syme's office.

Q. That is where you first saw this agreement?

A. First.

Q. Anyone else present there beside you and Alger Syme? A. No.

Q. What form was the agreement in when you first saw it?

A. Well, it wasn't complete, the time I saw this, but it was quite long, and we were going over some of the paragraphs in here, and he said—there has been some references made——

Mr. Lamey: Object to this as not responsive, reciting conversations that took place before this agreement was executed, incompetent, irrelevant and immaterial.

Court: I have indicated, on a limited basis, that is, not for the purpose of varying the terms of the contract, or anything of that nature, but to show there were discussions, that this line of testimony is admitted. In other words, there is a contract here. With reference to whether this contract must be strictly interpreted as against one party or the other, with reference to that, I think it is important for the Court to know what the circumstances were under which the contract was entered into. I am not going to, and I don't accept the evidence [203] for the purpose of varying the terms of the contract, but for the purposes of showing what the

(Testimony of Thomas A. Jirik.)

circumstances were under which the contract was entered into, I will accept and listen to any conversation that was held with reference to this negotiation.

Mr. Erickson: That is my only purpose, your Honor.

Court: Very well, so proceed.

Mr. Erickson: Can we have the last question, please?

(Question and answer read back by reporter.)

Court: Proceed now.

A. It was incomplete.

Q. And was there a discussion then between you as to revisions that were to be made?

A. No.

Q. Did you make any suggestions to Mr. Syme on changes you wanted? A. No.

Q. Now, thereafter, you saw the completed agreement, is that correct? A. Yes, sir.

Q. Now, I hand you the Exhibit 2, which is a photostat of an executed copy of the agreement, Exhibit 2, and ask you if the agreement was in the form that it now appears, except for the signatures, when you next saw it? A. Yes, sir.

Q. Now, where was that contract signed? [204]

A. Well, our contract was signed in Faribault, Minnesota, on February 11, 1935.

Q. Now, is there any language in that contract which you yourself drafted? A. No.

Q. Was there any language in there drafted by

(Testimony of Thomas A. Jirik.)

somebody on your behalf, by an attorney or agent?

A. No.

Q. Following the making of the agreement, Exhibit 2, what, if anything was done by the Fidelity Gas Company insofar as field operations are concerned, if you know, on your land?

A. Well, the first that they did anything in the way of a deep test was in 1936.

Q. Were you familiar with that yourself by personal observation?

A. Where the well was drilled?

Q. Yes.

A. I saw it, yes, but we was never apprised of the location before it was made or drilled.

Q. Do you know that is the N. P. No. 1?

A. Pardon me, I thought you had referred to the Warren well. The N. P. well, yes, I was there.

Q. That is down in the Little Beaver area?

A. Yes.

Q. That is approximately how far from your lands? [205]

A. About 32 or 34 miles.

Q. You were on the ground there a considerable amount of the time that the N. P. No. 1 well was being drilled, is that true?

A. Yes, sir.

Q. I believe on your deposition, you stated you assisted in the gauging of that N. P. No. 1 well?

A. At the request of Mr. Cecil Smith.

Q. At the time you assisted in gauging of the N. P. No. 1 well, I believe you testified you were aware of the drilling of the Warren well, is that true?

A. Yes, sir.

(Testimony of Thomas A. Jirik.)

Q. You would not be in a position to say whether you had or had not received that letter?

A. I don't think we ever have; I don't remember seeing it.

Q. Now, these letters I have just shown you, and which have been just introduced here, are all letters reporting on the progress of the deep testing, is that true? A. Yes, sir.

Q. As to the letter of November 1, 1937, you have no recollection of having seen that?

A. No.

Q. When did you first learn that the drilling activities in Warren No. 1 had been terminated or had ceased?

A. Sometime shortly, maybe two or three weeks prior to my trip to Baker.

Q. You had heard of that before you went to Baker and observed the well, is that correct?

A. Yes, sir.

Q. And after going to Baker, what, if anything, did you do in connection with that Warren well? A. Nothing.

Q. Now, the Warren well was drilled on one of your leases, is that correct?

A. Yes, on our Government permit.

Q. Subsequent to your trip to Baker, did you make a trip to Minneapolis to discuss any of these [209] matters with officials of Montana-Dakota Utilities or Fidelity Gas Company?

A. Yes, I did.

Q. When was that?

(Testimony of Thomas A. Jirik.)

A. It was prior, maybe two or three weeks prior to my going out there.

Q. You went to their office before you went to Baker, is that correct? A. Yes.

Q. To whose office did you go?

A. Alger Syme's.

Q. At that time, who was present?

A. Just Alger Syme.

Q. And yourself? A. And myself.

Q. Did you have a discussion concerning that Warren well? A. Yes, we did.

Q. What was that discussion?

Mr. Lamey: May it please the Court, we object, no proper foundation has been laid; it is incompetent, irrelevant and immaterial; they are now attempting to relate a conversation with a man who is deceased.

Court: I don't think that because he is deceased makes it incompetent or irrelevant. What is the purpose of the proposed testimony, counsel, with reference to the question of abandonment?

Mr. Erickson: That's right. I believe it is established Mr. Syme was attorney for Montana-Dakota Utilities and Fidelity and participated in drafting these.

Mr. Lamey: The mere fact an attorney drafts a document does not give him a right to speak for a company as an officer or official, and there is no showing he was anything other than an attorney who drafted an agreement here, Exhibit 2.

Mr. Erickson: I believe the record shows he was

(Testimony of Thomas A. Jirik.)

general counsel, but I can examine the witness further.

Mr. Lamey: It doesn't and it wouldn't be a fact.

Court: I think on that basis, as to whether or not he was a person who could bind the defendant, you may need some further foundation.

Q. Who was Alger Syme?

A. Alger Syme was, to my knowledge, the general counsel for Montana-Dakota Utilities, and the next man I knew as attorney was Mr. Hildebrand of Glendive.

Q. Do you know anything of what Mr. Syme's duties were as general counsel for the Montana-Dakota Utilities Company?

Mr. Lamey: We object, it is incompetent, irrelevant and immaterial, and may it please the Court, I would like to cite now to counsel and the Court all of the authorities he has been contending so strongly for in Carpenter against Industrial Gas, all of them.

Court: I don't think this man is in any position [211] to estimate what his duties were or what his authority was. It would seem to me you can get at that problem, but as the record now stands, I don't think the Court is in a position to accept the testimony with reference to the conversation of Mr. Syme because it doesn't appear, so far as I am aware, that he in any way could bind the defendant.

Q. Now, at the time you were in Minneapolis and talked to Mr. Syme, did you have any conver-

(Testimony of Thomas A. Jirik.)

sation with anyone else connected with the Montana-Dakota Utilities Company?

A. I intended to, but as happened many times, Mr. Smith was gone, and so was Mr. Heskett.

Mr. Lamey: Just a minute. I object to this as not responsive.

Mr. Erickson: I believe, your Honor——

Court: I think it is. He asked who else he talked with in the company. He is just explaining who else he talked to; the objection is overruled, proceed.

Q. Subsequent to that visit, did you at a later time return to Minneapolis and have any discussion with anybody connected with the Montana-Dakota Utilities Company concerning this Warren well?

A. Yes.

Q. When was that?

A. In regards to the Warren well, it was late in the fall of 1937. [212]

Q. And with whom did you have a conversation then? A. First with Mr. Heskett.

Q. And Mr. Heskett was then the president of the two companies, is that correct?

A. Yes, sir.

Q. Where did the conversation take place?

A. In his private office.

Q. Was there anyone else there present?

A. No.

Q. Now, will you tell us what the conversation was between you and Mr. Heskett with relation to the Warren well?

(Testimony of Thomas A. Jirik.)

A. Yes, Mr. Heskett told me that they got a dry hole, that they spent too much money, they were criticized by the stockholders and they were all through drilling for deep oil in the Baker field.

Q. Was there anything further said at that time in that conversation?

A. That was about all with Mr. Heskett. He was busy, and I excused myself. He had a number of calls; the telephone was just ringing continuously. I went over to Cecil's office.

Q. Who was Cecil? A. Cecil Smith.

Q. Was that on the same occasion?

A. The same, maybe three or four minutes afterwards.

Q. Who was present at the time you went to Cecil Smith's office? [213]

A. Just Mr. Smith and myself.

Q. Was there a discussion there concerning the Warren well? A. Yes.

Q. What was that discussion?

A. I said, "Mr. Heskett just informed me you folks are not going to do any more in the Baker field." He said, "We are not, we are all through."

Q. Was that was reference to any particular sands, or any particular activity?

A. Drilling for oil, deep wells.

Q. Was that all of the discussion between you and Mr. Smith at that time? A. That is all.

Q. You fix that discussion as sometime in the late fall of 1937. Did you thereafter have any further discussion with either Mr. Heskett or Mr. Smith concerning the Warren well? A. No.

(Testimony of Thomas A. Jirik.)

Q. Did you make any further visits to Mr. Heskett's office in Minneapolis after 1937, alone or in the company with someone else, in which the matter of the Warren well was discussed? A. No.

Q. Did you, sometime after 1937, visit Mr. Heskett's office in the company of George Seivers?

A. No. [214]

Q. Did you visit Mr. Smith's office in the company of—— A. Yes, sir.

Q. When was that?

A. Oh, that was a good long while afterwards, in late, I mean in the summer of 1938.

Q. Have you any way of fixing a closer time than the summer of 1938?

A. I believe May or June.

Q. Now, who was present at that conversation?

A. Just Mr. Smith and myself.

Q. Was George Seivers there?

A. Not the first time.

Q. Well—— A. No, he was not.

Q. Did you have a discussion with Mr. Smith sometime in 1938 concerning the Warren well?

A. No.

Q. Did it have anything to do with the deep drilling in the Cedar Creek Anticline? A. No.

Q. Well, now, did you make a visit to Mr. Smith's office in the company of Mr. Seivers?

A. Yes, sir.

Q. When was that?

A. That was my second visit pertaining to [215]

(Testimony of Thomas A. Jirik.)

drilling wells to the Eagle sand when Mr. Seivers was along with me.

Q. Was there at that time any discussion of drilling for oil? A. Yes, sir.

Q. There was present at that discussion you, Cecil Smith and George Seivers, is that correct?

A. That's right.

Q. Was anyone else there? A. No.

Q. Can you fix the time when that discussion took place?

A. About two months later than when I was there alone.

Q. With relation to the year 1938, what date would that be? A. In July or August.

Q. What was that discussion insofar as it related to drilling for oil?

A. Mr. Seivers was disappointed and asked Mr. Smith, he said he understood they had given up drilling any deep wells, and Cecil Smith said, "We absolutely have, we are not spending any more money, and we have given up drilling, deep drilling in the Baker field."

Q. Was anything further said about the deep drilling? A. That was all.

Q. Except for those conversations which you have related, did you have any more conversations with either Mr. Heskett or Mr. Smith concerning [216] the drilling to the deeper sands.

A. Not with Mr. Heskett, but I did with Mr. Smith.

Q. And when was that?

(Testimony of Thomas A. Jirik.)

A. That was about a year later.

Q. Where did that conversation take place?

A. In his office.

Q. Who was present then?

A. Nobody, excepting him and me.

Q. What was that discussion?

A. That was pertaining to the second sands wells.

Q. Any discussion then as to the sands below 2,000 feet? A. No.

Q. After these discussions, and after the receipt of the letters which we have referred to here, when did you next hear anything from Fidelity Gas Company or Montana-Dakota Utilities Company concerning the sands below 2,000 feet.

A. Well, there wasn't anything on the Cedar Creek Anticline. I did hear about the Shell well at Ritchie.

Q. I mean now with relation to Montana-Dakota Utilities or Fidelity Gas drilling for oil on the Cedar Creek Anticline?

A. We didn't hear any more about the deep oil drilling for about 15 years after that.

Q. Was the next time you had any word from Montana-Dakota Utilities or Shell on the deep testing the receipt of the letter concerning which counsel has stipulated, being Plaintiffs' Exhibit 14, dated April 27, 1951? [217]

A. I don't remember seeing this letter. That is not addressed to us either.

Q. We have stipulated you did receive a copy

(Testimony of Thomas A. Jirik.)

of it, and I am sure you did from the deposition.

A. I believe we might have.

Q. Assuming you had that letter in your file and it came to your attention, do you recall any other communication between the time you last talked to Mr. Smith about the deep sands until you received this letter? A. No.

Q. I now call your attention to Defendants' Exhibit 21, being a letter dated September 12, 1952. I will ask you to examine that letter.

A. Yes, we received this letter.

Q. You seen that letter, did you? A. Yes.

Q. That letter is dated, as I have indicated, September 12, 1952. Is that the first such notice that you sent to Fidelity Gas Company and Montana-Dakota Utilities? A. Yes, sir.

Q. Can you tell us why no similar notice or other notice was sent, was not sent to them prior to 1952?

A. Well, we were satisfied that they had no more claim on anything else except on gas from the first sand.

Q. Why were you satisfied of that? [218]

A. So much time elapsed, and nothing was done.

Q. Is there any relation between your failure to send notice earlier and the conversations you had with Heskett and Smith? A. No.

Q. I believe you misunderstood my question. Will you read the question again?

Mr. Lamey: I don't think so. We object to this as leading and trying to put words and suggestions in the witness' mouth.

(Testimony of Thomas A. Jirik.)

Court: Yes, it is leading. I think you can ask further questions along that line, though, to determine whether or not there is any mistake.

Q. Mr. Jirik, you have testified you didn't send that notice earlier because there had been no action? A. That's right.

Q. Was there any other reason you didn't send it earlier? A. Yes.

Q. What was that?

A. Because I was fully satisfied—it came from the head officers of Montana-Dakota Utilities—that they was out and there was no more use talking about it.

Q. Are you now referring to the conversations you had with Heskett and Smith?

A. It was the last talk on the deep test.

Q. Have you ever received any royalty from the [219] production of oil on your lands in Unit 5?

A. Not from oil.

Q. And what income you have had has been limited to income from gas, is that correct?

A. That's right.

Mr. Erickson: I want to make this one exhibit, your Honor. These are gas statements covering the agreements between Cedar Creek and Montana-Dakota Utilities for the year 1949 to illustrate the manner in which the unit operation is handled and the way in which the royalties are charged, and it could be any year, but I took 1949.

Mr. Johnson: I would like to inquire as to the materiality of this. The cause of action relating to

(Testimony of Thomas A. Jirik.)

the unit plan has been limited entirely to the question of whether the unit plan agreement applies to anything other than the Judith River sands. Those statements counsel is offering are only statements which account for gas production. I can't see where it has any materiality to this case at all.

Mr. Erickson: The purpose of the testimony is not to attack the validity of the Unit 5 agreement, but the answer of defendants alleges they have paid royalties and rentals on these properties, and have expended large sums of money, and they have also alleged at some length the benefits that have accrued to the plaintiffs from their purchases of gas from those sands, and the primary purpose is to [220] show the manner in which the royalties and rents have been paid and to illustrate none of them have been paid by them.

Mr. Lamey: Counsel will recall that answer was filed before you amended your reply and took out the section that pertained to these gas unit agreements, and gas purchase agreements.

Mr. Erickson: I would be happy to stipulate that, but your answer remains. You claim rights under Unit 5.

Mr. Lamey: As to the deep sand agreement, those will illustrate nothing to do with it.

Court: Well, I am going to receive them in evidence and find out what they will illustrate.

Mr. Erickson: I will put them in this folder.

Court: Those are statements that Cedar Creek received from Montana-Dakota?

(Testimony of Thomas A. Jirik.)

Mr. Erickson: Yes, and it is intermingled between 6 and 4, it is their complete operation. There is no way to separate them. They have but one purpose, to show the manner in which royalties are paid.

Court: I should think you could stipulate as to the manner in which royalties are paid. It seems to me it is a pretty simple proposition. Any question about it at all as to how royalties have been paid?

Mr. Johnson: Royalties have not been paid by Fidelity Gas Company. The royalties have been paid out of production. [221]

Mr. Erickson: Counsel wouldn't go yesterday when we tried to stipulate, counsel wouldn't go as far as to say the plaintiffs pay all the royalties. If he is willing to stipulate that they pay them rather than Montana-Dakota, it would be all right. It would be better for the Court to see them.

The Court: The contest between you is whether plaintiffs or defendants pay them?

Mr. Erickson: That's right.

Court: Your position being they are taken out of royalties that would otherwise be payable to the plaintiffs, and in effect are payments of the plaintiffs themselves?

Mr. Erickson: The way the thing works, they buy our gas. Before they pay us for the gas, they take out everything in the way of royalties and annual rents, and because those are spread over a

(Testimony of Thomas A. Jirik.)

year, I thought the year's statements would be necessary to show it.

Mr. Johnson: If the Court please, there is no question but what the royalties have been charged against the properties or the property owners and have been paid out of gas production under the unit plan, and the net remaining amounts have been distributed by Montana-Dakota Utilities to the various lessees or property owners under that agreement, and we make no claim——

Court: Does that satisfy you?

Mr. Erickson: No, I would rather put them in.

Court: Very well, I will receive them. Put them in. [222]

Mr. Johnson: May I ask counsel where in the answer the statement appears to which this evidence applies?

Court: I think it will take more time fighting about that than just putting them in, and let's go. We can look at it later.

Mr. Lamey: Let them go in maybe subject to our objection that they are incompetent, irrelevant and immaterial and illustrate no issue in this case.

Court: When trying a case like this, there is not much sense in wasting too much time arguing about the admissibility or inadmissibility of evidence, because you can make your point in your brief, and if it is well taken, we will exclude that evidence. Proceed.

Q. Mr. Jirik, do you know whether there were

(Testimony of Thomas A. Jirik.)

negotiations between your company and the Montana-Dakota Utilities Company concerning the unitizing of the Eagle sands in Unit 5? A. Yes.

Q. Can you tell about when those negotiations were? If I indicated a letter from Cecil Smith, which I don't care to put in and encumber the record further, dated in February, 1952, is that about the time? A. Yes.

Q. Did those negotiations result in unitizing those Eagle sands? A. No. [223]

Q. Did your company approve the unitization of the Eagle sands? A. No.

Q. You have been selling your gas production from your Eagle sands wells to the Montana-Dakota Utilities Company, have you not? A. Yes, sir.

Q. Can you tell us who paid for those wells? A. We did.

Q. During the years from 1938 on, after you had had your last conversations with Smith, until the present time, have you, on behalf of your company made any attempt to lease these sands below 2,000 feet? A. Yes, we have.

Q. And have you leased them to anyone else?

A. No.

Q. And have you made those attempts more than once? A. Yes, sir.

Q. And how extensively have you tried to lease them?

A. Well, maybe not extensive enough.

Q. That isn't quite responsive, but did you do it more than once, you say?

(Testimony of Thomas A. Jirik.)

A. Oh, yes, about five or six times, different people.

Q. And how long ago did those attempts start?

A. About three years ago. [224]

Mr. Erickson: That is all.

Cross Examination

Q. (By Mr. Lamey): Mr. Jirik, you stated that you have had considerable experience in the oil and gas development work? A. Yes, sir.

Q. Did I understand you to say you are a driller of at least gas wells? Do you have a drilling rig in your company?

A. I have a drilling rig of my own in Oklahoma, yes.

Q. Did you say that the greater portion of your personal operations in the oil business are in Oklahoma or Texas rather than Montana?

A. Since November of 1949.

Q. Now, as to these wells that were drilled, some six, I believe you said, which were drilled in Unit 5 before the unit agreement was set up?

A. No, the second sand wells were drilled afterwards.

Q. Did you drill them?

A. We had Montana-Dakota drill them for our account.

Q. That was on the sands that were not unitized? A. That's right.

Q. Were there some wells drilled on the unitized sands before the unit agreement?

(Testimony of Thomas A. Jirik.)

A. They were all drilled by us on the unit [225] agreement; they were all drilled prior to the making of the unit for the first sand.

Q. When the unit was set up, was there not some adjustment and allowance made for wells that had been drilled?

A. Well, the set-up was made for the whole field, which any unit that had any wells was given credit for the number of wells, and where it had no wells, it was charged.

Q. There was a stipulated price agreed on, was there not, for each well? A. Yes, sir.

Q. For such wells, then, as your company had previously drilled, you received stipulated compensation or price, did you not?

A. That was very little over half cost.

Q. That was what everyone had agreed on, and it was uniform, was it?

A. It was uniform for the field.

Q. When did you start selling your gas to the Montana-Dakota Utilities or Gas Development, or perhaps some other subsidiary or predecessor of M. D. U.?

A. We began to sell the gas prior to the unit agreement.

Q. I understood you to say you had to sign the Fidelity operating agreement and gas unit agreement in order to sell your gas, is that correct?

A. Yes, that was done at the same time all of them were made. [226]

(Testimony of Thomas A. Jirik.)

Q. You had been selling Cedar Creek gas for sometime before, had you not?

A. We first sold to the Carbon Black plant, yes.

Q. I have here an agreement I will be glad to show you, dated May 15, 1929, between Cedar Creek Oil and Gas Company and the Gas Development Company, which is designated "Agreement for Purchase of Gas by Gas Development from Cedar Creek Oil and Gas." Do you recall that? Would you like to see it? A. Yes.

Court: Court will stand in recess until 10 minutes after three.

(10-minute recess.)

Q. Do you recall the agreement now that you have examined it? A. Yes.

Q. Does that not refresh your mind that you were selling gas from at least this Warren land in '29 to Gas Development, one of the M. D. U. predecessor companies?

A. Prior to the signing of the unit plan?

Q. Yes, in 1929.

A. Yes, that is what I said, prior to the agreement for the unit plan.

Q. You had been selling gas?

A. Yes, from the one well.

Q. And later on, as I understand, you or your [227] company executed both the gas unit agreement and the Fidelity operating agreement at about the same time? A. Yes, sir.

Q. Were you on the Cedar Creek Anticline a good many years ago? A. Yes, sir.

(Testimony of Thomas A. Jirik.)

Q. About 1928, I believe you testified?

A. I was there prior to that.

Q. So, you are familiar with that Cedar Creek Anticline for many years? A. Yes, sir.

Q. You know something about U. S. G. S. surveys? A. Yes, sir.

Q. Is that the survey that is reflected on these maps that have been marked here as Exhibit 1 and 1-A? A. Yes, sir.

Q. It is my understanding that you were on there at least part of the time when well N. P. No. 1 was being drilled? A. Yes, sir.

Q. And is it also true you were there during some operation in gauging that well?

A. Yes, sir.

Q. About when was that?

A. I don't remember the date; you probably have that right handy there. [228]

Q. Well, that well was commenced in September, 1935.

A. Yes, and it was in the following summer.

Q. 1936 probably? A. Yes, sir.

Q. And you knew, did you not, about the drilling of the Warren well on land in Unit 5?

A. Yes, that came subsequently, after that.

Q. That's right, I believe that was started in October, 1936? A. Yes, sir.

Q. Did you make frequent trips in there during that period of time?

A. Well, not too frequent, but frequent enough

(Testimony of Thomas A. Jirik.)

to keep posted with it at the time of the N. P. well especially.

Q. Did that same situation prevail with reference to Smith No. 1? A. No.

Q. Were you there during the drilling of that well? A. No, sir.

Q. It is a fact, is it not, that that well was commenced about the same time as the well on the Warren? A. Yes, sir.

Q. But you just never went to the Smith well, is that it? A. No.

Q. Do you recall the drilling of the Carter well, [229] which commenced about May, 1941, down in the southwest quarter of the southeast quarter, Section 19, Township 4 North, Range 62 East?

Mr. Erickson: To which we will object on the grounds it is improper cross examination.

Mr. Lamey: I want to show his familiarity with the development that went on out there.

Court: Yes, for that purpose, go ahead.

Mr. Erickson: The further objection, which I take it will be a continuing objection, is as to the relevancy and materiality and foundation.

Court: Overruled.

Q. As a matter of fact, you were there at one time during the drilling of that well which was being carried on by Carter?

A. No, sir; Carter well? Yes, we made a trip to the Carter well. It was shut down and Perkins' Cementing outfit were pouring a cement pipe. It was dead when I was there; there was no activity.

(Testimony of Thomas A. Jirik.)

Q. About when was that?

A. That was sometime in 1941.

Q. Were you there at any time during the drilling of the well that Husky had charge of?

A. No, for the reason that those wells were too far away from us and I was not interested. [230]

Q. Why were you interested in N. P. No. 1?

A. Everybody in the whole country was.

Q. Why?

A. Because the plan was if that was a success, we might have a big field, that is why.

Q. Wasn't the Husky well in the vicinity of N. P. No. 1?

A. Yes, but we already knew the results of the N. P. well.

Q. You knew what?

A. I already knew the results of the N. P. well.

Q. So, you figured there was no chance of production in the Little Beaver area, is that right?

A. At that particular time I did.

Q. Have you learned since of the discovery of oil by Shell?

A. Yes, absolutely.

Q. So after N. P. No. 1, you had no further interest in any wells that were drilled down in Little Beaver?

A. That's right.

Q. Has the drilling of the well by Shell in Little Beaver created any new interest?

A. I am happy to tell you it is just a completely different picture with the Shell people doing what they are doing.

(Testimony of Thomas A. Jirik.)

Q. It puts an entirely different complexion on the whole Cedar Creek Anticline, doesn't it?

A. Absolutely.

Q. When did you first learn that the agreement [231] had been made with Shell by Fidelity?

A. Oh, that is not so long ago, sometime in 1951, I think it was.

Q. At the time of that letter which has been identified here, I think, dated April 27, 1951?

A. Prior to that.

Q. You learned prior to that? A. Yes.

Q. Through whom did you get your information?

A. From Mr. Austin, one of the Shell land men, in Tulsa.

Q. When was that?

A. Well, that would be—let's see, this is 1955, that must have been about 1950, about 1952, early in 1952.

Q. Well, prior to that, of course, you had seen the letter of April 27, 1951, in which they announced they had made an agreement, had you not?

A. Yes.

Q. And then you didn't learn anything from Austin of the Shell Company until 1952, is that correct?

A. Oh, yes, I did, in between times. The way that came about, Austin was trying to sell me some of the land in Rogers County, and that is how frequent visits was made to the office by myself. Maybe I didn't have the date on those. That is

(Testimony of Thomas A. Jirik.)

where I got the information about the good work you folks was doing on the Ritchie well. [232]

Q. It may help you to refresh your memory if I tell you my information, I think it is correct, is that the Ritchie well came in in July, 1951.

A. Yes, sir.

Q. Would you say it was about that time you talked to Mr. Austin? A. Yes, sir.

Q. Now, did you also learn of the Shell discovery in the Pine Unit in the Cedar Creek Anticline in January, 1952? A. Yes, sir.

Q. And would you also say that helped to put a new complexion on the whole Cedar Creek Anticline possibilities for oil production?

A. Yes, sir, it did.

Q. You testified on direct examination with reference to a notice or letter dated September 29, 1952, from your company to Fidelity Gas Company and Montana-Dakota Utilities Company with reference to cancellation. Do you recall that?

A. Yes, sir.

Q. From whom did you receive that form of notice that was sent out?

A. From John Wight.

Q. And did you send it out in substantially the form he had suggested?

A. Prior to sending it out, I had counsel on it, [233] and then sent it out substantially the same, as it covered the situation about correct.

Q. Now, when was your first visit in Minneapolis with Mr. Heskett or Mr. Smith in which

(Testimony of Thomas A. Jirik.)

you discussed this Warren well, and you received from them some indication that they were not going to do anything more out there?

A. In the fall of 1937, very late in 1937, yes.

Q. Did you make a special trip there for that purpose? A. Yes, sir, I did.

Q. And on that trip, you went alone, as I understand? A. That's right.

Q. You have been questioned concerning a letter dated November 1, 1937, signed by R. M. Heskett to either you or your company. I show you a photostatic copy of a document that appears in the deposition of Cecil W. Smith taken in connection with this case. A. Yes.

Mr. Lamey: Now, we have requested that the original be produced, and, counsel, I would like to know whether you have been able to find that letter?

Mr. Erickson: I don't recall the request.

Mr. Lamey: I take it from the witness' testimony you were not able to find it. In fact, he did not remember such letter, as I recall, so you don't have it, is that right?

Mr. Erickson: Yes. If we have it, we will be glad to produce it. [234]

Q. Calling your attention to the photostat, which I will have marked, I will ask you to read it so you may refresh your memory and tell me whether or not you recall receiving such a letter on or about November 1, 1937?

Mr. Erickson: We will stipulate that letter was

(Testimony of Thomas A. Jirik.)

received by Cedar Creek Oil and Gas at about the time it bears date.

Court: Very well.

Mr. Lamey: I think we had better have that removed and marked.

Mr. Erickson: Can't we agree it is the same as Exhibit—what is that exhibit?

Mr. Richards: That is Exhibit 12.

Mr. Erickson: The plaintiffs are agreeable to stipulating that the letter is the same as Exhibit 12.

Mr. Lamey: Except that letter 12 is signed by Cecil W. Smith, and directed to John Wight, whereas the letter about which the witness is now being questioned is signed by R. M. Heskett, and directed to whom?

Mr. Johnson: Mr. Thomas A. Jirik, Cedar Creek Oil and Gas Company, Faribault, Minnesota.

Court: Very well, it is so stipulated, is it?

Mr. Erickson: Yes.

Q. Now, do you recall that you did see the letter on or about November 1, 1937? [235]

A. It has evidently been in the office. I may not have seen it when it came there because sometimes I am out of the office a month or two at a time, but I will admit the letter came there because there is a photostatic copy of it.

Mr. Lamey: I would like to have Mr. Jirik's deposition made available to him, please.

Clerk of Court: I don't find any deposition.

Mr. Lamey: We don't have one.

Mr. Erickson: We for some reason or other

(Testimony of Thomas A. Jirik.)

seem to have an extra one. This one seems to be an executed copy. We have had it for a month. I don't know how we happen to have it. We may stipulate it should be in the Court's file.

Mr. Johnson: We will let you look at this one.

Court: Well, do you want—

Mr. Lamey: If that is the original, it should be filed.

Mr. Erickson: It is agreeable to the plaintiffs.

Mr. Lamey: It is agreeable to us.

Court: It is not executed by the Notary Public.

Mr. Erickson: Yes, it is.

Mr. Lamey: Let's leave it this way: we will check with the Clerk and if the original is not filed, we will arrange to have this filed.

Mr. Erickson: So far as the plaintiffs are concerned, we are agreeable to stipulating that is a true and correct copy of the deposition as it was [236] taken. I believe it has been signed by Mr. Jirik, but has not been certified by the Notary Public. At the time of taking the depositions, your Honor, it was stipulated between the parties that it could be executed and signed before any Notary Public and without regard to time.

Court: Yes, I see. It apparently was executed before—by Mr. Jirik before a Notary Public for the State of Oklahoma, but there is no certificate, there is no executed certificate by the Notary Public before whom the deposition was taken, but for whatever purpose it serves, it may be admitted.

(Testimony of Thomas A. Jirik.)

You stipulate that is the deposition that was taken, and that he was sworn?

Mr. Lamey: That's right.

Court: Very well, you can file it.

Q. Now, Mr. Jirik, you also testified that you had a second visit to Minneapolis and a conversation with Mr. Smith, I believe, with reference to this same subject sometime after the fall of 1937, is that correct? A. Yes, after that, yes.

Q. Now, was that the time when Mr. Seivers was with you, or was it a later time?

A. The first time I was alone, the second time Seivers was with me.

Q. All right. We have the first time fixed sometime late in 1937? [237] A. Yes.

Q. And now this second date, please?

A. The second date would be sometime, I believe, sometime in February the following year.

Q. 1938?

A. Yes, sir, as near as I can remember, that is about right.

Q. And on that visit, you were alone with Mr. Smith when you discussed this?

A. The second visit?

Q. Yes.

A. No, the second visit was with Mr. Seivers; the first one I was alone.

Q. Then, you say you had another visit at which you discussed the same subject with Mr. Smith, did you not? You had three visits down there on this subject, or two? A. With Cecil Smith?

(Testimony of Thomas A. Jirik.)

Q. There was one with Heskett in the fall of 1937? A. Yes.

Q. Then, you say in February, 1938, Seivers and you discussed this with Cecil Smith, is that correct? A. Yes.

Q. And then did you discuss it with Cecil Smith or Mr. Heskett at any other time?

A. No. The first time was with Mr. Heskett and Smith; the next time was Smith alone. That was [238] on the second sand wells; and the third time Mr. Seivers was alone. On the second sand wells, we tried to get some second sands drilled. That is the time we had it with Mr. Smith alone.

Q. There were only two times, then, that you had discussions pertaining to what you say was the abandonment of the field out there and the deep drilling?

Mr. Erickson: May it please the Court——

Mr. Lamey: Maybe I am dense. I have difficulty in following it.

Mr. Erickson: The question misstates the testimony. Mr. Jirik just said there were three times.

Mr. Lamey: I am trying to get when they visited the third time. I haven't been successful.

Witness: May I repeat?

Q. Yes.

A. The first time with Mr. Heskett and Cecil Smith.

Q. That was in the late fall of 1937?

A. That's right. I was alone. The second time—that was when everything was all off, the drilling

(Testimony of Thomas A. Jirik.)

of any deep wells. The second time I was again alone with Mr. Smith. I was in there pertaining to drilling second sand wells.

Q. All right, when was that?

A. That was prior to the time Mr. Seivers was with me, about two months, almost. Then, Seivers was with me the third time. Do you get it now?

Q. That was in February, 1938, when Seivers was with you?

A. Yes, sir, the end of the month, end of February, 1938.

Q. Now, by late in 1937, your first meeting, would it be as late as November?

A. It was prior to November.

Q. Well, what month then?

A. Either early in November or the last of October; sometime prior to the end of the year anyhow.

Q. Then, would it be correct to say that sometime between that time and the first of the year, you had a meeting with Mr. Smith alone?

A. After the first of the year.

Q. How long after?

A. Oh, probably a week or two.

Q. And that was in Mr. Smith's office in Minneapolis, was it? A. That's right.

Q. Just you and he were there?

A. That's right, we had many of those visits together alone over a period of years.

Q. As a matter of fact, you frequently visited the office up there, did you not?

(Testimony of Thomas A. Jirik.)

A. Yes, most of the time I didn't find those fellows in. They were all over the country.

Q. Most of the time you found them there?

A. Sometimes I did, more times I didn't; that is the truth.

Q. Most of the time you went up there, you visited with Mr. Heskett and Mr. Smith?

A. Mostly Smith and Syme; Heskett was generally unavailable.

Q. You had a good many visits with Mr. Smith?

A. Yes.

Q. With reference to affairs out on Cedar Creek?

A. With reference to the field, and then they got out in the Bowdoin field which they acquired in Shelby at one time. We had leases in Shelby, and we had production over there. Naturally I was interested in what was going on over there.

Q. Now, then, we are correct now, there were only three times in which you ever discussed deep drilling in the Cedar Creek Anticline with either Heskett or Smith. Those are the dates you have now given, late in 1937, sometime after the first of the year in 1938, and again with Seivers about the latter part of February, 1938, is that correct?

A. That is about right.

Q. Now, have you had occasion since coming here preparatory to being a witness to read the deposition, or copy of the deposition, that you gave in Billings on June 11, 1953?

A. Yes, this is it right here.

(Testimony of Thomas A. Jirik.)

Q. Do you recall that in your deposition you testified with reference to a conversation with Mr. Heskett late in 1937? A. Yes, sir. [241]

Q. And do you also recall that you said that shortly after you had seen Mr. Heskett, you saw Mr. Smith and discussed this same subject with him? A. Yes.

Q. Now, is there anywhere in your deposition where you refer to this conversation with Smith early in January, 1938, or the conversation at which Seivers was present late in February, 1938?

A. That is not in the deposition at all.

Q. It is not there at all, is it?

A. No, not to my knowledge; we can check to be sure. I don't think it is.

Q. I have checked, I don't find it and I wondered if you had. A. All right.

Q. Now, I direct your attention to page 30 of your deposition, to the last question that appears on that page. A. Yes.

Q. "Question, As I take it, Mr. Jirik, you have stated the basis for your claim of abandonment which is referred to in the Exhibit No. 3 of the Seivers deposition. Do you have any added ground for your claim that Fidelity abandoned its agreement? Answer, Well, I think I have a very sufficient ground stated from Mr. Heskett, and the reason I believe that Mr. Heskett told me at the [242] time when he told me they were all through, he said, 'On that first well which we drilled which you helped to gauge report got into Minneapolis

(Testimony of Thomas A. Jirik.)

how big it was before we even got back from Baker and we had such adverse comment from our stockholders that it was really serious, that we had no business drilling for oil, that we are a utility company.' And I think that was pretty sufficient ground for me to think they had abandoned whatever rights they might have had. Question, That is the conversation you previously referred to? Answer, In his office. Question, And that took place in 1937? Answer, Yes. Question, But you can't give us the month? Answer, I can't give you the month. I might be able to find a record of it at home; if I can find it, I will give it to you. Question, You have nothing further to add? Answer, Nothing further." Now, at the time and place indicated, did you so testify? A. Yes, sir.

Q. Now, do you recall that Exhibit 3 of the Seivers deposition was the letter of September 29, 1952, from your company to Fidelity Gas Company and Montana-Dakota Utilities Company stating that you claimed they had abandoned and forfeited their agreement, or had abandoned it? I will show you that Exhibit 3, it is in here.

Mr. Erickson: It is an exhibit in the case, too.

Mr. Lamey: Is it in the case?

Mr. Erickson: It is on the Herman Smith [243] testimony, Exhibit 30. I believe it is the same—no, no, it isn't. It isn't the same. I have handed Mr. Jirik the copy.

Mr. Lamey: You have given him this one?

Mr. Erickson: Yes.

(Testimony of Thomas A. Jirik.)

Q. Will you look at Exhibit 3 to the copy of Seivers' deposition which you now have in your hand? Do you see it there?

A. Yes, I already had that here before.

Q. Now, I will ask you if that is not the same exhibit that was referred to in your deposition in the question which was propounded, "As I take it, Mr. Jirik, you have stated the basis of your claim of abandonment which is referred to in the Exhibit 3 to the Seivers deposition. Do you have any added ground for your claim Fidelity abandoned its agreement?" In answer to that question, you gave the answers I have indicated.

A. Yes.

Q. It is a fact, is it not, that this Exhibit 3 in the Seivers deposition was the document to which reference was being made in that portion of your testimony? A. No.

Mr. Erickson: To which we will object because I believe the question is confusing. It is certainly confusing to me, in addition to the fact that the deposition doesn't indicate that state of facts. [244]

Court: Let me see the deposition. What page are you referring to?

Mr. Lamey: Page 30, the bottom of the page.

Court: Now, what is your objection, counsel?

Mr. Erickson: I don't believe the deposition makes any reference to that letter at all.

Court: It refers to Exhibit 3 to the Seivers deposition.

(Testimony of Thomas A. Jirik.)

Mr. Erickson: I will withdraw the objection.
Court: Very well.

Q. Let me put it this way, Mr. Jirik: At the time that question was asked of you, namely, "As I take it, Mr. Jirik, you have stated the basis of your claim of abandonment which is referred to in the Exhibit 3 of the Seivers deposition. Do you have any added ground for your claim that Fidelity abandoned its agreement?" At that time, you were shown this Exhibit 3 of the Seivers deposition, were you not?

A. At the deposition time?

Q. Yes. A. Possibly I was, yes.

Mr. Lamey: No further cross examination.

Court: Any redirect examination?

Mr. Erickson: Yes. In view of the references to the letter of September 9, 1952, which was Exhibit 3 to the Seivers deposition, we have had it marked as Plaintiffs' Proposed Exhibit 37, and now offer it as an exhibit. [245]

Mr. Lamey: No objection.

Court: Admitted.

(Plaintiffs' Exhibit 37 admitted in evidence.)

Redirect Examination

Q. (By Mr. Erickson): Mr. Jirik, in the last questions asked by Mr. Lamey with reference to your deposition at page 30, the question was recited to you, "As I take it, Mr. Jirik, you have stated the basis for your claim of abandonment."

(Testimony of Thomas A. Jirik.)

That language followed your statement as to your conversation with Mr. Heskett, is that true?

A. Yes, sir, sure, that was the basis of it. I wouldn't have said it if I didn't hear it.

Q. Later in the same question, it goes on, "Which is referred to in the Exhibit 3 of the Seivers deposition." Now, is it your testimony now that in determining your claim of abandonment, you had reference to the Heskett conversations, is that true?

A. Yes, sir.

Q. And not solely to what may have been stated in Exhibit 31? A. Right.

Q. Exhibit 37. On cross examination, Mr. Lamey showed you an agreement dated the 15th day of May, 1929, between Cedar Creek Oil and Gas [246] Company and Gas Development Company, which covered the sale of gas, that is correct, is it not?

A. That's right.

Q. On cross examination, Mr. Lamey asked you questions which indicated you were selling gas under that agreement at the time you made the unit agreement? A. Under this agreement?

Q. Yes. A. Not under the unit plan.

Q. But you were selling gas under that 1929 agreement? A. Yes, sir.

Q. Do you know what happened to that agreement? A. Which?

Q. This one of 1929?

A. That was superseded by the unit plan agreement.

Q. At the time you made the unit plan agree-

(Testimony of Thomas A. Jirik.)

ment, was Montana-Dakota Utilities Company or Gas Development Company willing to continue to purchase gas from you under the 1929 agreement?

A. Providing only if the agreement was signed.

Q. What agreement?

A. The Unit agreement.

Q. Who made any statement like that to you?

A. Mr. Smith.

Q. Mr. Cecil Smith?

A. Yes, sir. Further, I was told they were buying no gas from anybody unless it is in the unit plan. [247]

Q. You were told by Mr. Smith unless you signed the unit agreement, they would purchase no more gas from you? A. That's right.

Q. Tell us the same thing a little more slowly?

A. We were scared if we didn't sign it, we couldn't sell no gas and would lose our leases.

Q. Why were you scared?

A. There was no other market.

Q. Did you testify you had a conversation with Mr. Smith in which that was told you?

A. Yes, sir. All those things were prepared. We haven't made any corrections on any of them, any alterations.

Q. I don't know whether the situation is clear. Did you have a conversation with Mr. Smith prior to the signing of the unit agreement as to whether they would continue to buy gas from you if you didn't sign the unit agreement?

(Testimony of Thomas A. Jirik.)

A. That was understood by everybody.

Q. Did you have a conversation with Mr. Smith?

A. Yes.

Q. What was the conversation?

A. The only ones they were going to buy gas from were the ones that got in the unit.

Q. Did he tell you that?

A. Yes. He told that to others, too.

Q. Now, there was a question asked you on cross examination [248] about whether when you signed the unit agreement, you were paid for wells that you had already drilled, referring to the six wells, is that correct? A. That's right.

Q. Do you know who paid you for those wells?

A. I think the check came from Montana-Dakota Utilities.

Q. Do you know who ultimately furnished the money for paying for some interest in your wells?

A. Some of the money was furnished from production on leases that we didn't have no production on.

Q. And, of course, that is covered by the unit agreement, is it not? A. Yes.

Q. Now, you say you visited the Carter well, is that correct? A. One time.

Q. Did you discuss the Carter well with any officials of the Montana-Dakota Utilities Company?

A. No.

Q. Have you seen the contract under which the Carter well was drilled? A. No.

(Testimony of Thomas A. Jirik.)

Q. Do you know the ownership of the land on which the Carter well was drilled?

A. No, I don't know.

Q. What about the Husky well, do you know anything about [249] whose land that was drilled on?

A. I saw that in the paper. I believe it is on some Smith land.

Q. Do you know what Smith?

A. No, there is a number of Smiths over there, I don't know which Smith.

Q. Now, you sent out the notice or sent the letter which is Plaintiffs' Exhibit 37 and Exhibit 29, and I believe you testified on cross examination that the original form of that letter had been received from John Wight, is that correct?

A. That's right.

Q. I believe you also testified you discussed that letter with your attorney, is that correct?

A. First I discussed it with the general counsel of the Independent Petroleum Association of America, and second with Mr. Rehnke of Minneapolis.

Q. It was after discussing it with the attorney of the Independent Producers Association, of which I understand you are a committee member, and so forth, and your counsel, Mr. Rehnke, that this notice was sent out, is that right?

A. That's right.

Mr. Erickson: That is all.

(Testimony of Thomas A. Jirik.)

Recross Examination

Q. (By Mr. Lamey): With further reference to Exhibit 37, I call your attention to the fact that the document in evidence does not bear any signature. We have here the original, and I would like to have you look at it and compare it, and then tell me whether or not you signed that letter for Cedar Creek?

A. Yes, this is the same—let's see. That's right, just as I answered you, I signed that letter.

Q. You signed the original letter that went to Fidelity?

A. I dictated the letter and signed it myself.

Q. You did that after you had had it examined by two attorneys?

A. Yes, sir.

Q. Did you tell them all the facts.

A. Showed them the letter.

Q. Showed them the letter and explained the facts and circumstances you had in mind with reference to Unit 5, did you not?

A. That's right.

Q. You told them of your conversations with Mr. Smith and Mr. Heskett, did you?

A. Yes, sir; may I say this—

Q. Well, I say you did tell them of those conversations?

A. Yes, sir.

Q. Now, I call your attention to the third sentence in the last paragraph, which reads, as follows: "Operations were [251] abandoned, and it was either formally or informally announced at the time that any further efforts to develop the lower

(Testimony of Thomas A. Jirik.)

zones were abandoned.” That appeared in your letter, does it not?

A. In the last paragraph?

Q. Yes. A. Yes.

Q. You say it was either formally or informally announced to you? A. Yes.

Q. You make no statement—or have you ever written any letter to Montana-Dakota Utilities or Fidelity Gas in which you said on these dates they made statements to you that they were abandoning this operation?

A. This is the letter, I thought.

Q. This is the only letter you ever wrote in that regard, isn't it? A. That's right.

Mr. Lamey: That is all.

Mr. Erickson: That is all.

(Witness excused.)

Court: Call the next witness. I think we might take a short recess until 10 minutes after four.

(10-minute recess.) [252]

GEORGE H. SEIVERS

called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Will you please state your name? A. George H. Seivers.

Q. Mr. Seivers, I know from past experience you are inclined not to speak quite as loudly as you

(Testimony of George H. Seivers.)

could. Will you make an effort to speak out pretty strongly. Where do you live, Mr. Seivers?

A. Faribault, Minnesota.

Q. Are you connected with Cedar Creek Oil and Gas Company? A. Yes, I am.

Q. What position do you hold with that company? A. Secretary-Treasurer.

Q. How long have you held that position?

A. Since about 1937.

Q. Can you give us an idea of what time of year in 1937?

A. It was our annual meeting during the month of March, either the 8th, 9th, or 10th of March when I was appointed.

Q. In 1937? A. Yes.

Q. So you did not participate in the negotiation of the various contracts that are here in evidence, is that correct? [253] A. None whatsoever.

A. In your position as Secretary-treasurer, you generally have charge of the financial records of the company, is that correct? A. Correct.

Q. And also of correspondence files?

A. Correct.

Q. Now, calling your attention to the Warren well, which is on property included in this complaint, when did you first know of the drilling of the Warren well?

A. It was mentioned in our office through Mr. Jirik in regards to this Warren well that it had been abandoned.

Q. No, I didn't want you to give the conversa-

(Testimony of George H. Seivers.)

tion, but you learned of it when you first became Secretary-Treasurer, is that right?

A. That's right.

Q. Calling your attention to early 1937, did you have occasion to go to Minneapolis with Mr. Jirik?

A. Yes.

Q. When was that?

A. You are wrong. It was shortly before our annual meeting and during the month of March.

Q. My question, I misspoke myself. If I said 1937, I meant 1938, is that correct?

A. Well, I presume I was elected in 1937, but it was in 1938 [254] when I called at the Montana-Dakota Utilities office.

Q. With Mr. Jirik? A. Yes, sir.

Q. And you fix that date as being prior to your annual meeting, is that correct? A. Yes.

Q. Why do you think the trip was made prior to your annual meeting in March, 1938?

A. First of all, I wanted to get some idea of who the people were we were dealing with and have a chance to meet those people and have a conversation so I would have something to base my claims on, or at least in my working capacity, know who I was dealing with.

Q. And was there any other reason why you would fix the time as being before the March meeting of 1938?

A. First of all, there has been a tremendous lot of criticism in the organization because there had been no rents paid for a long time——

(Testimony of George H. Seivers.)

Mr. Lamey: Object to this as incompetent, irrelevant and immaterial, hearsay.

Q. The only thing I was interested in, and I believe Mr. Seivers was coming to that, but it would probably take him too long a route to get there—is there anything about your recollection that makes you think you went up there before the annual meeting? [255]

A. One thing was to find out if there was any possible chance of them drilling any more of the second sand wells.

Q. Maybe I can lead the witness to this extent: Was it your thought that the trip was before the annual meeting because you wanted to make a report to your stockholders in connection with the activities of the company? A. Surely.

Q. Now, who did you see when you went to Minneapolis in company with Mr. Jirik?

A. We talked to Mr. Syme first that Mr. Jirik introduced me to, and also to Mr. Smith.

Q. That is Cecil Smith? A. Yes, sir.

Q. Did you have a conversation with Cecil Smith at that time concerning the oil sands or the deeper sands in your properties in Unit 5?

A. He mentioned——

Q. Did you have a conversation? A. Yes.

Q. Who was present?

A. Mr. Jirik and myself.

Q. The conversation took place in Mr. Cecil Smith's office? A. Yes.

Q. Now, what was the conversation?

(Testimony of George H. Seivers.)

A. First of all he told us they were completely abandoning [256] all the oil business, that there was no more oil as far as they went in the State of Montana.

Q. Did he make—was he making reference to the Cedar Creek Anticline?

A. No—I don't know, I presume that was; if it were, it was in that oil reference.

Q. Did he say anything further about their plans as to the oil operations in Montana?

A. Only that he mentioned that they were abandoning the oil operation.

Q. And that was all the conversation that occurred at that time with Mr. Smith, is that correct, as far as the oil is concerned? A. Yes.

Q. The rest of the conversation dealt with the Eagle sands, is that correct? A. Yes.

Q. Did you have any further conversations with Mr. Smith or any other official of the Montana-Dakota Utilities Company concerning drilling to the deeper sands, the oil sands?

A. The only one was with Mr. Smith.

Mr. Lamey: Before we get off this, I would like—back about the third question, his answer, I didn't quite get it.

(Questions and answers read back by Reporter.)

Q. Mr. Seivers, did you have some correspondence from the [257] Montana-Dakota Utilities Company with relation to a proposal to unitize the Eagle sands? A. We have had letters from them.

(Testimony of George H. Seivers.)

Mr. Lamey: I would like to inquire of counsel what relevance these documents or exhibits have?

Mr. Erickson: May I qualify the witness a step further, then I will point out the relevancy? .

Q. Plaintiffs' Exhibit 38, proposed, is a copy of a letter, apparently on the letterhead of Montana-Dakota Utilities Company, dated January 25, 1952, and bearing the signature of Cecil W. Smith. Plaintiffs' Proposed Exhibit 39 is a document entitled "Geological Report." Now, did you receive the Geological Report, to the best of your recollection, with the letter of January 25, 1952?

A. It must have come at the same time.

Q. It is part of your files, is that correct?

A. That's right.

Mr. Erickson: Before offering the exhibits, counsel has asked as to what we consider the materiality. The materiality of the exhibit is found on page 3 of the proposed Exhibit 39, wherein it is recited, it starts at the paragraph at the bottom of the page, following a discussion of Warren No. 1, and concluding with the last sentence in that paragraph, "Drilling at this well was completed, and the hole temporarily abandoned in January, 1937," and the document has the printed [258] signature of Harry A. Schroth, and accompanied the letter of January 25th, and I offer the two exhibits.

Mr. Lamey: We make no objection except it is incompetent, irrelevant and immaterial.

Court: Admitted, the objection is overruled.

(Testimony of George H. Seivers.)

(Plaintiffs' Exhibits 38 and 39 received in evidence.)

Q. Mr. Seivers, you have heard the testimony in the courtroom as to a series of reports and letters that were written in 1935 and 1936 by the Montana-Dakota Utilities Company to Cedar Creek Oil and Gas concerning the operations in the deeper sands, and you have also heard testimony as to a letter of April, 1951, and succeeding letters, concerning the Shell agreement, that is correct, is it not?

A. That is correct.

Q. Now, you are generally in charge of the office at Fairibault, Minnesota, are you not?

A. Yes.

Q. In the intervening years between the last of the letters in 1937, and the first of the letters in 1951, do you recall receiving any correspondence from the Montana-Dakota Utilities Company or Fidelity Gas Company with relation to any operations or testing or drilling to the oil sands, being the sands below 2,000 feet, on your property?

A. No.

Q. Did you ever receive a report from Montana-Dakota Utilities [259] officials verbally, or Fidelity Gas officials verbally during that intervening period of time covering any such operations?

A. No.

Q. And in preparation for your deposition and for this proceeding, have you searched your files to see whether there is any such correspondence or reports?

(Testimony of George H. Seivers.)

A. I have turned over all reports that were available from Montana-Dakota Utilities Company to Mr. Erickson.

Q. You have testified that you generally were in charge of the office accounts of the company over these years. Did you ever receive any royalty payments for oil from any of your properties in Unit 5, the Cedar Creek Anticline?

A. I didn't quite get that question.

(Question read back by Reporter.)

A. The only payments we have ever received was on the regular deduction sheets.

Q. That was for gas, is that true?

A. That was for gas.

Q. Have you ever gotten any oil royalty payments? A. No.

Mr. Erickson: That is all.

Cross Examination

Q. (By Mr. Lamey): Mr. Seivers, do I understand that it was early in 1937 [260] that you went up to Minneapolis with Mr. Jirik to talk to Mr. Smith and meet the people there?

A. I went in there one time to meet them, but the one trip we actually made in there, I met Mr. Syme at one time and some of the men at the office. I wouldn't say definitely if I met Mr. Smith at that time, but the one main trip I made with Mr. Jirik up to the main office was to find out what the possible chance was that we had of having more of the second sands drilled.

(Testimony of George H. Seivers.)

Q. That, as you say, was in 1937, is that right?

A. As far as the date goes——

Mr. Erickson: As far as the date goes, we object, because the date was not, it was in 1938.

Q. I am sorry, in 1938 it was when you went up on the main trip you refer to?

A. The main date, it would be impossible. I made this trip in particular for one of our meetings to find out more of the possible chance we had of drilling more of the second sand wells. It was the first or second one of those trips.

Q. Mr. Jirik testified you and he went to Minneapolis in the latter part of 1938 and conferred with Mr. Smith, is that about your recollection?

A. Yes.

Q. At that time you were Secretary and Treasurer of the Cedar Creek Company? [261]

A. Yes.

Q. And did you have some obligation to make a report of some kind to the company or stockholders as Secretary and Treasurer?

A. No, but one reason was if you dealt with these men, you knew who you were dealing with. That was one reason Mr. Jirik wanted me to meet the men, to have a knowledge of who these men were that we were dealing with.

Mr. Lamey: May we have Mr. Seivers deposition?

Q. Mr. Seivers, do you recall that your deposition was taken in this case at Minneapolis on May 19, 1953?

(Testimony of George H. Seivers.)

A. The exact date—I know it was taken in the fall of the year.

Q. Actually it was taken in May, according to the deposition, which I will show you, May 19, 1953. The date appears right on the very first page. No, inside, the first page. Now, I will ask you to refer to paragraph 3, or page 3, pardon me, beginning with the second question down, which reads, "Are you in anyway connected with a corporation known as Cedar Creek Oil and Gas Company?" to which you answered, "Yes." Do you find that place?

A. Yes.

Q. Now, at that time and place indicated, did you not testify as follows: "Question, In what capacity? Answer, Secretary and Treasurer. Question, How long have you held that [262] position? Answer, Oh, I would say approximately, it must be at least 10 or 12 years. Question, Since approximately 1940? Answer, I would estimate close to that date. Question, Prior to that time, did you have any connection with that company at all? Answer, Well, I would say it has been about five or six years that I have been Secretary and Treasurer. Before that I was on the Board. Question, That is, since 1940 you have been a member of the Board of Directors? Answer, That's right. Question, And since approximately 1948 you have been Secretary and Treasurer? Answer, Yes." Now, did you so testify at that time?

A. Yes. First of all, when I went in on this testimony, I had no dates, I had no reference what-

(Testimony of George H. Seivers.)

soever as far as the actual time of when I had taken over as Secretary and Treasurer.

Q. Since that time you have checked the records, is that it?

A. Having no reason—I know the dealings of Mr. Jirik, and the time he states when I became Secretary and Treasurer. I had not checked the file, records.

Q. Mr. Jirik has told you when you became——

A. No. As far as that goes, I mean on the actual date of that, I know it was in the fall of the year I made the trip in to see Mr. Smith.

Q. Fall of what year?

A. I cannot definitely state what year that was.

Q. Might it have been 1940?

A. No, it was earlier than that, earlier than 1940. I would be unable to give you a definite date on that.

Q. Then, you are not sure you were there in the latter part of February, 1938, are you?

A. Unless I would have an opportunity to check those records thoroughly.

Q. After your deposition was taken, did you check your records? A. No, I haven't.

Q. And I assume you came out here from Fari-bault, Minnesota to be a witness in this case, did you not? A. Yes.

Q. Did you check your records?

Mr. Erickson: The witness has answered.

Court: Overruled.

Q. Now, Mr. Seivers, I would ask you to turn to

(Testimony of George H. Seivers.)

page 4, at the top of the page, "Question, before 1940, were you connected in any way with the company? Answer, No, outside of being a stockholder."

Did you, at the time and place of your deposition, so testify? A. Yes, according to this here.

Q. You signed it, did you not? You may look at the back. A. That's right.

Q. And it is a fact, Mr. Seivers, is it not, that you had [264] an opportunity to go over that deposition before you signed it? A. Yes.

Q. You did, did you not?

A. Yes. This statement was made in 1938. Those statements should be in the year 1938 when I originally made this.

Q. Now, I would like to have you turn to page 23 of your deposition, and the second paragraph down under Question, which reads as follows: "Question, Well, what I mean, Mr. Seivers, is have you attempted to keep yourself informed as to the operations that Fidelity Gas Company carried on in the search for oil below two thousand feet on the Cedar Creek Anticline commencing in 1935 and continuing up until the present time? Answer, Not during the—not from 1935 until I became a member of the Board. Question, And that was about 1940? Answer, Approximately." Did you so testify?

A. Yes, but as far as all of our dealings were at that time, it was connected mainly with the gas operation, I mean it was just actual gas, and no connection—in fact, on this testimony, I had no knowledge of any oil operations whatsoever.

(Testimony of George H. Seivers.)

Q. At the time your deposition was taken, you had no knowledge of oil?

A. As far as I remember, oil had been abandoned, and there was no oil in the territory.

Q. When did you learn about it after your deposition? Someone [265] told you about these abandonments since your deposition was taken on May 19, 1953?

A. This fact is very confusing to me. When I went in there, I had a girl that was secretary, and the main thing I was watching at that time was our financial statements, and as far as the contracts and those, I never withdrew any of those contracts and examined those records.

Q. Now, I will ask you to refer to page 25, the first part, if you care to read it yourself, you may, but it refers to letters or conversations with Mr. Smith, and down in the middle of the page, I call your attention to the question reading, "As nearly as you can recollect, when did those conversations begin. Answer, Well, I wouldn't want to say 1940 because I would like to check the accuracy of the date when I went into office, but it was since I became Secretary and Treasurer of the Company." Did you so testify at the taking of your deposition? A. Yes.

Q. And then, continuing from there, "Question, Have you had numerous conversations about it? Answer, Yes, we have. Question, And they have been with Mr. Smith? Answer, Yes. Question, They have been here at the Montana-Dakota Utili-

(Testimony of George H. Seivers.)

ties Company office? Answer, That's right. Question, And have they related to the development of gas or the development of oil? Answer, That was related to gas." Did you so testify [266] at your deposition? A. Yes.

Q. Now, calling your attention to page 26, about the middle of the page, beginning with the question, "The conversations did not relate in any way to deep drilling for oil, is that right? Answer, Never had anything because that, as far as I know—we have never had any correspondence in regards to oil out there. Question, Have you had any conversations with regard to oil? Answer, No. Question, Or have you had any conversations with regard to deep drilling, that is drilling below two thousand feet on this property? Answer, Yes. Question, What was that about? Answer, That we would finance, go ahead and have them drill more wells for us and take out of the proceeds to develop, to become a larger producer. Question, Aren't you speaking of the Eagle sand production now? Answer, Yes, because that was mostly contained to the Eagle sand." Did you so testify in your deposition? A. Yes.

Q. And at the bottom of page 27, the last question, "You have had no conversation about drilling below 2,000 feet? Answer, No." Did you so testify at your deposition?

A. Yes, because first of all, there is where I was confused so far the depth went, between the Eagle sand and your Judith River sand. I didn't

(Testimony of George H. Seivers.)

know definitely what depth those wells were drilled at. [267]

Q. I would like to have you refer to page 29, about line 15, to the question, "But, do you know anything about the development for oil, the search for oil, in this area below 2,000 feet? Answer, No." Did you so testify? A. Yes—no, I didn't.

Q. You so testified, did you not, in your deposition? A. Yes.

Q. Now, maybe what you are trying to express is found—I will read you the next question, "You don't know anything about what wells may have been drilled pursuant to the Fidelity gas operating agreement? No. You don't know whether there was one well, two, three, four or five, or how many? Answer, No." Did you so testify at your deposition?

A. Yes.

Mr. Lamey: That is all.

Court: Any redirect?

Mr. Erickson: Yes.

Redirect Examination

Q. (By Mr. Erickson): Mr. Seivers, on the cross examination, reference has been made to the deposition and to statements made in the deposition that you had not discussed oil with anyone insofar as these lands are concerned. Do you recall that testimony? A. Yes. [268]

Q. Now, in view of that testimony, what have you to say as to your testimony today that you did have a discussion with Cecil Smith?

(Testimony of George H. Seivers.)

A. Only that Mr. Smith mentioned to Mr. Jirik as far as oil was concerned, that they had abandoned it.

Q. That was the only discussion of oil there was, is that correct? A. That's right.

Q. But you did have that conversation with Mr. Smith in Mr. Jirik's presence, is that true?

A. That's true.

Q. As to the date when you became Secretary-Treasurer, that date would appear on the records of your company, would it not? A. That is true.

Q. And there is—is there someone in your office in Faribault now?

A. I might be able to contact a man who does the secretarial work for me because of my job, and that I have one party I would have to contact. It is this secretary.

Q. Mr. Seivers, the position of Secretary-Treasurer of Cedar Creek Oil and Gas Company is not a full time job?

A. No, in fact, we haven't drawn any salaries out of it for years; we haven't drawn any salary.

Q. What is your position? [269]

A. I happen to be in charge of sales of the Twin City Seed Company.

Q. That is your regular business? A. Yes.

Q. This job of Secretary-Treasurer of Cedar Creek is an extra job, is that true? A. Yes.

Mr. Erickson: In view of the questions asked of the witness about his deposition, the plaintiffs at

(Testimony of George H. Seivers.)

this time would like to offer the whole deposition as to the original deposition.

Mr. Lamey: I think the proper way to proceed, counsel may question him with reference to anything else in the deposition.

Court: If you object, I will sustain the objection. Counsel only examined him, properly, with reference to his testimony, and you may likewise put in any portions of it.

Mr. Erickson: I am perfectly willing to do that, but counsel will realize that in view of the small part of the deposition put in, I will have no alternative but to go through the whole deposition and ask him if he testified thus and so. I would ask counsel if they are willing to stipulate the whole deposition may be submitted?

Mr. Lamey: I am not objecting particularly about the deposition, but I don't want all of this going in without an [270] additional opportunity to cross examine this witness. Now, if he is going to put something else in, I want the right to cross examine. That is why I am not stipulating to the deposition.

Witness: May I ask a question?

Court: Yes.

Witness: First of all, I have never been on a Court case. When I was asked for the deposition, I had no one to go to, I had no knowledge or anything of the time or what it contained, and Mr. Erickson came in from Montana, and I had no way of checking those records. In fact, as far as secretarial

(Testimony of George H. Seivers.)

work, it could be very easily referred to at the time, I could get information from our office very easily. As far as the date goes, I was truthfully at a loss, because all of our operations we ever handled was always handled on the gas operation. There was no oil ever mentioned, outside of Mr. Jirik mentioned at an early time they had started these wells and they had been abandoned, and then also through Mr. Smith.

Q. Do you have a copy of the deposition? You have a copy, and turn to page 8, the question was asked, "So that now the handling of oil and gas properties is a full time business for Mr. Jirik? Answer, As far as I know." Was that question asked and answered by you at lines 10 and 11?

A. Mr. Jirik has always handled most all of the Cedar Creek business affairs. [271]

Q. Now, just restrict your answer to whether you testified that way, if you will? A. Yes.

Q. Now, line 19 at page 18, "Question, What interests do you claim that Cedar Creek Oil and Gas Company has in properties in Unit 5 in the Cedar Creek Anticline? Answer, You mean the exact, how much acreage, is that what you refer to? Question, I mean the nature of its interests? Answer, Well, outside of being the unit agreement that we signed—— Question, There are two Government leases, one of them is No. 025044-A——"

Mr. Lamey: Pardon me, just a minute. What page is this?

Court: Let me suggest that this is not proper.

(Testimony of George H. Seivers.)

Just because you take a deposition, it is not entitled to be introduced in evidence. You can't introduce it by asking was this question asked you and did you make this answer. You are not entitled to put it in.

Mr. Erickson: I am not going to do it to the extent the Court suggests, but there were questions asked of this witness, we believe, out of context, and in order to show the context in which the answers were given, it is necessary to establish the background under which the answer was given.

Court: The answers on which he cross examined?

Mr. Lamey: I didn't have the page. I was over on 19. I agree that anything that pertains to a question I asked, explains it, he is entitled to go into the deposition, if there [272] is an explanation.

Court: Confine it to that. It doesn't appear to me from your question that it related to the point Mr. Lamey cross examined him about.

Mr. Erickson: The point of examination on this particular portion, before I come to 19, is to show the witness, when asked the questions was confused as to which agreement was being inquired about, and which sands were being inquired about. That was the purpose of putting in this testimony.

Court: If it appears in the deposition that he says he was confused, why fine, put it in.

Q. The last of the question was, "Cedar Creek claims an interest in each of those properties, does it not? Answer, I would like—as far as the numbering and that, I would almost have to check those

(Testimony of George H. Seivers.)

records." Was that your testimony on the depositions?

A. Is that referring to the two top leases you had just mentioned?

Q. Yes. A. Yes.

Court: Counsel, I might suggest that the witness has already explained that, he has said here on the stand that he doesn't know whether he was Secretary-Treasurer in 1938 or 1939. You see, it is the date he can't fix. He is confused on the date, he has already said that. [273]

Mr. Erickson: This is for the purpose of determining what he meant by his statement that there had been no discussion about oil. It is directed to that rather than the time he became Secretary-Treasurer. Those are the questions I had in mind.

Court: He said on the stand here there were no discussions of oil, didn't he?

Mr. Erickson: Yes.

Court: You are not going to impeach him by showing that in the deposition he said there were discussions of oil, are you?

Mr. Erickson: He said on the stand here, both on direct and cross examination there was a discussion of oil to the extent of the conversation he had with Mr. Smith.

Court: Yes.

Mr. Erickson: And the purpose of this was to show there was additional testimony.

Court: It is improper. What are you trying to do, impeach him?

(Testimony of George H. Seivers.)

Mr. Erickson: I am trying to explain his answers to the questions.

Court: He is right here, he can explain them. I think we are just going too far afield. You can read every question and answer in the deposition if we proceed this way. The deposition is not entitled to be produced in evidence just because [274] it is a deposition. Only under particular circumstances may a deposition be introduced.

Mr. Erickson: May I have just a minute, your Honor, to see if there is something here that—

Q. At the time the deposition was taken, Mr. Seivers, can you say whether or not you were familiar with the various agreements that have been put in here, being Exhibits 2, 3 and 4, the operating agreement, the unit agreement, and the gas purchase agreement? A. No.

Q. And since the time of your deposition, have you had an opportunity to examine those contracts and familiarize yourself with them to a greater extent?

A. I mean between the deep sands and those other sands, yes.

Q. Can you say whether or not at the time of the deposition when questions were asked of you concerning the deep sands you had in mind the Eagle sands rather than sands below 2,000 feet.

Mr. Lamey: We object to that as leading.

Court: Sustained.

Q. Do you now know the various sands existing

(Testimony of George H. Seivers.)

in the Cedar Creek field with relation to the various depths involved?

A. Yes, I know they are above 2,000 feet.

Q. When you say "they", which sands do you have reference to? [275]

A. The Eagle sands are above 2,000 feet.

Q. When in the deposition you referred to discussions concerning oil, can you say whether or not you had in mind sands below 2,000 feet, or above?

A. I would naturally believe it would be below 2,000 feet if they were going in for oil.

Q. Were there any discussions concerning sands below 2,000 feet other than the conversation you related here with Mr. Smith?

Mr. Lamey: May it please the Court, we object as being incompetent, irrelevant and immaterial. The question doesn't indicate with whom.

Q. With Mr. Smith?

Mr. Lamey: When or where?

Court: He has amended his question by reference to Mr. Smith, any conversations with Mr. Smith. The objection is overruled. You may answer.

A. First of all, the question from Mr. Smith was that he brought up——

Court: Just answer the question.

Q. Were there any other conversations with Mr. Smith concerning sands below 2,000 feet?

A. No.

Q. That was the only conversation?

A. Yes. [276]

Q. Mr. Seivers, you have testified that the rec-

(Testimony of George H. Seivers.)

ords of Cedar Creek Oil and Gas Company will show the actual date on which you became Secretary-Treasurer, is that true? A. Yes.

Mr. Erickson: In the light of the testimony now, and the statement now of Mr. Seivers, that is all, except I would ask permission of the Court to recall Mr. Seivers on that particular point before the end of the trial.

Court: Very well. Any further cross examination?

Mr. Lamey: No further cross examination.

(Witness excused.)

Mr. Erickson: Those are all the witnesses that the plaintiffs have.

Court: Good. I was just going to inquire about that situation. What does it look like on the defendants' side. How much longer are we going to be working?

Mr. Lamey: About two days.

Court: Well, we will be working Saturday then.

Mr. Lamey: All right, it is so understood.

Court: Fine.

Mr. Lamey: We are perfectly willing to go ahead. We have witnesses here. It might not take that long.

Mr. Erickson: In the other matter, the Carpenter matter, we haven't had an opportunity to go into that matter. We will go into it this evening and make a statement to the Court tomorrow [277] morning.

Court: Court will stand in recess until ten o'clock tomorrow morning.

(Whereupon, a recess was taken until 10:00 o'clock, A.M. the following day, April 15, 1955, at which time the following proceedings were had:)

Mr. Lamey: May it please the Court, we will, if the Court thinks it might help at all, make a brief opening statement to give the Court and counsel a better idea of the evidence we will introduce.

Court: Very well.

Mr. Lamey: I would like Mr. Armin Johnson to make this statement.

Court: Very well.

Mr. Johnson: If it please the Court, our statement will not be directed to any discussion of our legal theories, but only outline briefly the evidence we propose to introduce.

We propose to show that the Fidelity operating agreement, the unit agreement, and the gas purchase agreements, which are exhibits 2, 3, and 4 here, were entered into as part of one deal or transaction, and that similar agreements were entered into with interested property owners up and down the structure in the various units, 1 to 8, as shown on the map; that the purpose of the Fidelity operating agreement was to bring together under common control the properties on the Cedar Creek Anticline, so that Fidelity, or some other operator acting [278] on its behalf and under the terms of the Fidelity operating agreement could undertake a program for the cooperative prospecting and devel-

opment of the Cedar Creek Anticline for oil, having in mind the high cost of deep drilling.

We propose to show at that time it was the opinion of the geologists that the Cedar Creek Anticline was a single geological structure, and that same conception continues right down to the present time.

We propose to show that following the execution of the Fidelity operating agreement, Fidelity and Montana-Dakota commenced a program under which a geophysical survey of the Cedar Creek Anticline was made and preliminary well locations were determined. In 1935 the drilling of the first test well was commenced, and from that time on, Fidelity has been continuously engaged in a program of activity which either through its own employees or agents, or through some other oil company with which it entered into agreement to carry on exploratory work under the terms of the Fidelity operating agreement; this work of exploration and development has gone forward. We propose to show that Fidelity itself, in furtherance of this program, drilled three wells in the period from 1935 to 1938, that it spent upwards of half a million dollars in doing so; that commencing during that same period of time, and continuing through into 1939, it was negotiating with the California Company, and induced the California Company to make a geophysical [279] survey of part of the Anticline in 1938, and, as I say, also negotiated with the California Company to induce it to take on the full development of the Anticline.

We propose to show that in furtherance of its program, Fidelity caused Carter Oil Company to explore the area and drill a test well in 1941, in 1942, under the terms of the Fidelity operating agreement.

During the war years, shortages caused a curtailment of the development program, but immediately following the war, Fidelity carried on negotiations with the Texas Company, J. L. Manning, and Husky Refining Company, which resulted in inducing Husky to come in and drill a well in 1949, acting under the terms of the Fidelity agreement.

Commencing in 1950, Fidelity and Montana-Dakota sought to interest Shell Oil Company in undertaking the exploration and development of the Cedar Creek Anticline under the terms of the Fidelity operating agreement, and by reason of the fact that Fidelity had under contract most of the unitized area of the Cedar Creek Anticline, they succeeded in making a contract with Shell on April 10, 1951, under which Shell agreed to assume the obligations of Fidelity under the Fidelity operating agreement and commenced a program under which the entire Cedar Creek Anticline, including Unit 5 and all the other units have benefited and will continue to benefit.

Although we contend that this evidence will show there [280] has been no default at any time, we propose to show that no notice of default pursuant to the terms of Paragraph 2 of the Fidelity operating agreement has ever been given to Fidelity. We pro-

pose to show through the evidence I have already referred to, and other specific evidence which we will introduce directed to alleged conversations, that no abandonment has taken place, that there has been no intent to abandon, and there has been no act of abandonment by or on behalf of Fidelity at any time. We propose to show that substantial expenditures have been made by and on behalf of Fidelity and Shell, in reliance on the continued existence of the Fidelity operating agreement, and those expenditures have been made during a period when the plaintiffs knew of such activities and failed to assert any invalidity or any termination of the Fidelity operating agreement, and by reason of such, the plaintiffs are now estopped to claim the agreement is not in force, and also by reason of such they have been guilty of laches.

We intend to show that the plaintiffs have failed to attack the Fidelity operating agreement until the time when, through the efforts of Fidelity and Shell, acting under the Fidelity operating agreements, the lands of the plaintiffs have been tremendously enhanced in value.

Now, because of the commitments of some of our witnesses, it will be necessary in some cases to present our testimony out of chronological sequence, but their testimony, when presented, [281] will all be a part of this pattern.

FRANK W. DE WOLF

called as a witness on behalf of the defendants,
being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Lane): Will you please state
your name? A. Frank W. De Wolf.

Q. Where do you reside?

A. Urbana, Illinois.

Q. How long have you lived there?

A. Since 1907, with the exception of nine years
when I was living in Texas.

Q. What is your profession?

A. I am a geologist.

Q. Will you give us your educational back-
ground in geology?

Mr. Erickson: We are willing to stipulate as to
the qualification of the witness as a geologist.

Q. I think briefly, if you could, despite the stip-
ulation, for which I thank counsel, if you will give
us just a brief sketch of your educational back-
ground in geology?

A. I was a graduate of the University of Chi-
cago, specializing in Geology in 1903. I continued
graduate work there, and then entered the United
States Geological Survey as a Geologist [282] Aid,
Assistant Geologist.

Q. What degree did you obtain from the Uni-
versity of Chicago?

A. B.S., Bachelor of Science.

Q. Do you have any other degree in Geology?

(Testimony of Frank W. De Wolf.)

A. I have the equivalent of a Master's Degree, but no title.

Q. What has been your professional experience as a Geologist?

A. I was three years with the United States Geological Survey, part of it in the Pennsylvania oil fields, part of it in the Illinois oil fields; then I became Assistant Director, and later Director of the Illinois Geological Survey, which position I occupied from approximately 1911 to 1923. I then went to Texas as Chief Geologist with an oil company, and had experience in the management of an oil company in Louisiana; then I returned to the University of Illinois as head of the Geology Department in 1931, and continued in that position until 1946, when I retired.

Q. And what is your status now?

A. I am a Consulting Geologist, but not very active.

Q. During the time you were head of the Geologic Department at the University of Illinois, did you do consulting work and other work in geology?

A. I did a limited amount of consulting work outside of the State of Illinois, and mostly in the summer vacation period.

Q. In about 1934, were you called upon by Cecil W. Smith, of [283] what was then the Minnesota Power Company, a predecessor of Montana-Dakota Utilities Company, to do some work and prepare a report in connection with the Cedar Creek Anticline in Eastern Montana?

(Testimony of Frank W. De Wolf.)

A. Yes, I was asked to advise the Company as to whether deep drilling for oil on that anticline would be justified, and whether a location for a successful well could be made on present knowledge, or whether a geophysical survey should be undertaken, and if so, to what extent.

Q. Had you previous experience in geological work in Montana?

A. Yes, in 1919, I had done work in Central Montana for several months.

Q. And now, in carrying out the undertaking for Mr. Smith and his Company, will you tell us what you did in connection with the Cedar Creek Anticline up to the time you made a first report?

A. My first report to Mr. Smith's company was based on a study of Rocky Mountain fields and characteristics of the structures and sands. This anticline was a peculiar one, having one very steep side and one very gentle side. A study of similar anticlines lead to certain conclusions, and in my report, I analyzed these things and advised geophysical work to solve some of the problems, for example, such asymmetrical anticlines very commonly are different at great depths from what they are in the shallow depths. [284]

Q. At this point, tell us briefly as you can what your definition of anticline is? What do you mean when you refer to an anticline?

A. Yes. These rocks, well, the rocks are laid down originally flat in the sea, and if compressed from the sides or uplifted from beneath, they may

(Testimony of Frank W. De Wolf.)

fold up into a series of folds, some up and some down. The up-folds we call anticlines, and the down-folds, synclines. If the anticlines are very steep on one side and gentle on the other, as Cedar Creek is, then the axis which comes down and divides the anticline may not be in the same position in the deep beds as in the shallow beds, and in locating a well, you want to be on the side of the axis that has favorable gathering ground conditions. You must make allowances for the possible movement of the axis in the structure in the deep lying beds. Therefore, a well like the Absarokee, although it was located on top of this structure at the gas field level, might have been far away from the crest of the anticline down at the depth of the Dakota sandstone.

Q. To what well are you referring when you mention the Absarokee well?

A. It is one of which I have a location, and which I know the location.

Q. Was that drilled on the Cedar Creek Anticline? A. Yes. [285]

Q. By—

A. Northern Pacific interests, I think.

Q. Was that drilled prior to the time you made your report of which you are now speaking?

A. Yes.

Q. I think perhaps we had better put a question to you now. You stated in your report you recommended that geophysical work be done on the structure, did you not? A. Yes.

(Testimony of Frank W. De Wolf.)

Q. What sort of work is that? Will you describe what you mean by geophysical work?

A. I mean specifically the kind of work which is called seismology or seismographic work, with which I was familiar from my residence in Texas. It is a process by which shocks are induced by dynamite in a hole in the ground, and waves of force go out in all directions, some of which go down and bounce back to a detecting instrument, so that the elapsed time is determined very, very accurately. Based on that, the depth of a bed from which the reflection occurs is calculated by these operators, and if you can start at a well with a good log as an aid, you can interpret the undersurface reflections. The echoes that come back from certain hard beds, for example, if I may continue just one minute, by setting up and beginning that work near the Absarokee well, which was drilled to the Dakota sandstone, one could tie the principal echo into a depth of 3900 feet at that place, if that was the depth, and so, by [286] making a series of cross sections with these instruments, one could determine the under-surface shape of this anticline, whether it was like the surface shape or different, and whether the axis had moved in the deeper beds from the shallow beds.

Q. At that time, did you have available the U.S.G.S. maps similar to those that are on the wall here as Exhibit 1 and 1-A, I believe, minus, of course, all of the lines and well locations and so forth?

(Testimony of Frank W. De Wolf.)

A. May I show you an identical map?

Q. It is an identical map that you made use of, is that right?

A. Yes, as a base on which to plan this geophysical work, and if it is relevant, I could show you the equivalent of that map with certain red lines on it showing where these cross sections were made by the geophysicists throughout a length of 40 miles on this anticline.

Q. Do I understand then, the red lines indicate what?

Mr. Erickson: To which we will object on the grounds of relevancy, your Honor.

Mr. Lamey: It is merely illustrating his testimony.

Court: Yes, I think it is admissible, but you had better put the map in evidence if you want to use it.

Q. Did you make use of your U.S.G.S. maps of the Cedar Creek Anticline in preparing your report and in recommending further [287] geophysical work?

A. Yes, it was very important.

Q. What is reflected upon the U.S.G.S. maps generally?

A. There is shown to be an anticline, steep on the west and bordered by a narrow syncline on the west; on the east, a long broad, gently sloping anticlinal limb or side up which oil might migrate readily from a great big gathering ground, which to my mind gave a preference to a location on the east side of the axis rather than the west side.

(Testimony of Frank W. De Wolf.)

Q. Does the U.S.G.S. map have continual lines and elevations shown thereon?

A. It does, and these elevations, these contour lines, which you might regard as lines of equal level, level lines, are shown on these maps close together on the west side, and far apart on the east side, and also, you would notice, if you looked at it closely, a series of little circular or oblong areas along the backbone of this fold, which we call crossed areas, minor domes. They are shown on this map, but they are not very strong, they are mild forms.

Q. Now, do I understand, then, that the purpose of recommending geophysical work was to help you ascertain whether minor domes became stronger at depth?

A. That was one of the purposes; very often that is true.

Q. The other was what?

A. The other was as to whether the axis itself would be [288] found east or further west in the deep lying beds which might be drilled to, whether the axis did migrate.

Q. Did you receive a geophysical report and have access to the results of that work?

A. Yes, a geophysical report was submitted and progress reports were submitted, and there was a lot of telephoning as this work went on.

Q. Who did that work?

A. It was done by the Colorado Geophysical Company.

Q. What have you to say as to whether geophys-

(Testimony of Frank W. De Wolf.)

ical work was somewhat new, at least in the Rocky Mountain area at that time? A. It was.

Mr. Erickson: I wonder if Mr. Lamey would ask him the times of the geophysical survey. I don't believe it is in the record.

A. It would have been in the spring of 1935, I believe.

Q. What have you to say as to whether geophysical work was new in the Rocky Mountain area at the time this was done in 1935?

A. Yes. It had been introduced in the Gulf Coast area about 10 years earlier, but in a different form, a different sort of geophysical work, if I may use the word, it was called refraction work instead of reflection work. This Colorado Geophysical Company was a subsidiary of the Texas [289] Geophysical Company, and opened up an office in Denver. I believe the work was just beginning in the Rocky Mountain region.

Q. Did you correlate the report on the geophysics with what you had found shown on the survey maps, and from other investigation, such as the log of the Absarokee well?

A. We found, if I may give you the conclusion briefly, the geophysics indicated that the structure was very much the same at a great depth, a depth of 8,000 feet, as it was up in the shallow beds, that the axis had not migrated very far, perhaps a little to the east, but not very far. The little domes along the backbone were evident in the geophysical maps, but not greatly different, no great increase in their

(Testimony of Frank W. De Wolf.)

magnitude with depth, Such faults, little breaks, as that map shows were especially studied to see whether they might become bigger at depth, more important in the interfering with oil circulation and migration. The geophysical work did not show much change in those forms.

Q. From that, what did you conclude with reference to the structure, that is, the Cedar Creek Anticline, so far as migration of oil was concerned?

A. We concluded it was essentially one structure——

Mr. Erickson: At this point I want to object and move to strike the answer because it appears there was a written report which contains these conclusions, which would be the [290] best evidence.

Mr. Lamey: We have a report in 1935 before the geophysical work. We have that available, Mr. Erickson, and would be glad to make it available to you.

Mr. Erickson: May I inquire of counsel as to whether the testimony of the witness now relates to the activities in 1935 before the geophysical work was completed, or to a later date?

Mr. Lamey: This relates to his findings after the geophysical work and after his report that he made. He made one written report in January, 1935, recommending geophysical work. The geophysical work was done, and then there was no written report. There were telephone calls, now and then a letter, something like that, but no other written report.

Mr. Erickson: Could you fix the date when the

(Testimony of Frank W. De Wolf.)

reports were made so I would have a little something to tie to.

Mr. Lamey: Yes.

Q. The original report in which you recommended geophysical work was January 24, 1935, was it not? A. That is correct.

Q. If I am not correctly stating the sequence from there on, as far as reports are concerned, I would be glad to have you supply it.

A. What you have said is correct. There was no further formal report made to the company. Things were moving too [291] fast. We talked about it and telephoned to each other, wrote letters in some cases. Did I finish? No, I was interrupted.

Mr. Erickson: I withdraw my objection.

Mr. Lamey: Reporter, perhaps you could go back. I would like to have the question read.

Witness: I would like to know whether it was left in the air.

(Question and answer read back by reporter.)

A. It was one structure leading up to a major closed dome at the south end, the so-called—what is it, Little Beaver.

Q. Will you point it out?

A. (Indicating on map): The Little Beaver Dome was the dominant top on this great long anticline, and it didn't appear that the minor domes along the backbone ought to interfere with the migration of oil up into that highest part. Consequently, a location for a well was recommended to be

(Testimony of Frank W. De Wolf.)

drilled up on that high part to begin with, the first place to begin.

Q. Will you state whether or not that location you recommended was the place where the N.P. No. 1 was drilled?

A. That was the location; and I may say further it was placed far enough east of that supposed axis at depth so that even in the case of a crooked hole, it wouldn't be finished up on the wrong side of the axis, on the west side, it would finish on the east side of the fold, if possible. That well [292] as you know, was located right there, and the axis itself is over here (indicating) at the surface about a mile, and at the sub-surface, a little further east.

Q. Mr. De Wolf, on the map is written a legend. I wonder if that well you pointed out is the Smith No. 1 or the N.P. No. 1?

A. It is marked "MDU 1"—no, "N.P.", and this is the Smith just north of it about half a mile, and the Warren, of course, is up there (indicating).

Q. Now, were you in touch with the operations during the drilling of the N.P. No. 1 well?

A. Yes, I visited it and was represented by two assistants, geologists, three in fact, who were placed on the well as sample examiners. I had previously been with them in the Black Hills, examining the rocks there from top to bottom, which we expected to meet in this well, to help us in identifying them; so these young men, these three geologists, were on the drilling well on an eight-hour basis, and all of the cores and samples were examined by them and

(Testimony of Frank W. De Wolf.)

reported to me by wire and shipped to me in bags, and I kept in touch with the progress in my office, and we communicated by telephone and telegraph.

Q. What have you to say as to the formations that were found in the N.P. well, whether or not they were as you had expected, or if there were any abnormal conditions? [293]

Mr. Erickson: To which we object on the grounds of materiality and relevancy.

Court: I don't myself immediately see its relevancy, but proceed. I don't think we have to go through all the wells that were drilled.

Mr. Lamey: No, we are merely trying to show they found conditions that weren't expected, and what they were, because it does have a bearing on future development.

Court: On the operations that took place later. Very well, proceed.

A. We found conditions as expected and resembling those in the Black Hills down to a considerable depth; then we ran into a mass of salt which was unknown in this part of Montana; and still lower we ran into beds which proved later to be an extension of beds known at that time only in the Big Snowy Mountains over to the west. Those Big Snowy beds had extended east and were present in this well, to our surprise, and we were very much at a loss to know what they were for a time. Eventually it was straightened out what they were, but that introduced the possibility of irregularities in these deep beds which had not been anticipated.

(Testimony of Frank W. De Wolf.)

Q. Did you then have something to do with the location of the Warren well in Unit 5?

A. Yes.

Q. What was your part in locating that well?

A. There was a conference between Mr. Cecil Smith and myself as to locating a well up there, and I think there had been an agreement to locate the second well north of Baker, and that location was thought to be favorable, the axis having a gentle and uninterrupted slope toward a great big gathering ground on the east side, so that location was decided on.

Q. Did you also have some part in locating Smith No. 1? A. Smith No. 1?

Q. Yes.

A. Yes, that was located, that location was agreed on at a time when we rather hoped N.P. No. 1 was going to be a producer, and the Smith well, therefore, was located not too far away from the N.P. well, and in a direction that would be thought to be favorable. I may say after those three wells, I had nothing more to do with the further locations, including the current work that is being done.

Q. Now, were you able to correlate findings from logs, say in the N.P. Well No. 1, and the Warren well in Unit 5? A. Yes.

Q. And in what way did that give you information or assistance in your geological findings and advice?

A. The correlation of the two wells was very satisfactory, and as a result, of course, the Warren

(Testimony of Frank W. De Wolf.)

well was found to be much lower structurally, down the plunge of this anticline northward from the high place. The height above sea level of [295] the sand which was reached in the Warren well was four or five hundred feet lower than the same bed was in the No. 1 N.P. well, if that is what you have in mind, that situation.

Q. Now, you have made reference to the fact that it was your conclusion that the Cedar Creek Anticline constituted one structure? A. Yes.

Q. What do you mean by a structure?

A. Well, this is a feature having—this is a feature having certain characteristics throughout of being an up-lifted mass of rocks with slopes right and left, and also plunging toward the north, and that is a structure, or structural features having identity.

Q. You stated something with reference to a conclusion on whether or not oil could migrate from one end of the structure, or one place in the structure to another. Will you please amplify that some, tell us what you had in mind?

A. Yes. In general as oil and water occur in a porous rock, and that rock is tilted, there is a tendency for those fluids to migrate up the tilt, and for the oil to be found resting on the water and to be trapped on the top of the structure, beneath which there might be water. Now, so far as we knew, when we started, the beds in this structure were all rising toward the south, and there would be a chance for the oil to migrate up to the south,

(Testimony of Frank W. De Wolf.)

and we located our first well in the [296] south end on that account. The introduction of these Big Snowy beds in there, to our surprise, complicated the picture, and it is quite evident that if any one bed pinches out and doesn't continue up to the south end of the structure, the oil may be trapped in that bed where it pinches out, where it becomes shaley, or ceases to continue, so the introducing of these Big Snowy beds complicates the picture. You may find oil, in my opinion, in various places on that structure now, rather than to expect it all to migrate up to the high end of the structure.

Mr. Lamey: You may cross examine.

Cross Examination

Q. (By Mr. Erickson): Mr. DeWolf, what was the last of the active work you did on the Cedar Creek anticline by way of consultation with Fidelity Gas or with Cecil Smith, or anybody else in that connection?

A. I cannot tell you for certain, but I presume—well, I can't tell you. It was a long time ago.

Q. Did you see the logs on the Carter well?

A. I was furnished a log of the Carter well, but gave no advice on it.

Q. Did you make a study of that log?

A. Yes. [297]

Q. Were you furnished a log of the Husky well? A. No.

Q. You are aware, Mr. DeWolf, there has been extensive geophysical work on the Cedar Creek An-

(Testimony of Frank W. De Wolf.)

ticline, particularly since the year 1950, are you not?

A. Well, I know the Carter Company did some geophysical work before drilling the well.

Q. But as to the more recent rather extensive geophysical work, you are not familiar with it?

A. I am not familiar with it, no.

Q. I believe you made it clear that migration would be interrupted by the presence of synclines, is that correct?

A. Yes.

Q. So, in an examination of the map and the profiles that are shown—you will understand I don't know much about geology—in looking at the map, Exhibit 1-A, you have made reference to the Little Beaver area, and as you go north through Unit 8-A and 7 and up to Unit 6, there seems to be what would appear to be some sort of a pinching out. Would that indicate a syncline to you, or what is that?

A. I would call that a saddle between two domes, a low place between two domes; that isn't a pinching out. The thing you are describing now is a structural feature, it has a dome, it goes down to a saddle. The pinching out I refer to is in the sand itself, or in the rock bed down below the [298] surface.

Q. Would the presence of a saddle like that, carried clear down to the oil sands, tend to interrupt the migration of oil in a northerly-southerly direction along the anticline?

(Testimony of Frank W. De Wolf.)

A. Yes, that was the purpose of the work, to see whether down at the Madison and Dakota, to see if they were magnified and stronger than on this map, and the result was they didn't seem to be.

Q. Would your last answer I made some objection to, and which I withdrew, show geophysical work was done in the area adjacent to the City of Baker? A. Yes.

Q. And can you tell from your recollection now whether the geophysical work in that area indicated that this structural feature to which we refer—it is just above the words “Unit No. 6”—is the same as shown on the map, or approximately so?

A. May I glance at this to see how close this cross section is to Baker? There is a cross section right at Baker shown on this map, and I don't know why this couldn't be introduced in evidence.

Mr. Lamey: Have it marked if he is going to testify from it.

A. And the condition as revealed by the geophysical work was closely similar to what you see on that map there, I would say not appreciably different. [299]

Mr. Erickson: I believe it may be stipulated that Exhibit 40 may be introduced as part of the defendants' case.

Mr. Lamey: With this understanding: I think we have some photostats of it. We would like to substitute. I know Mr. DeWolf would like to keep it.

Witness: This is your photostat.

Court: Very well, it is admitted.

(Testimony of Frank W. De Wolf.)

(Defendants' Exhibit 40 admitted in evidence.)

Witness: And I might make another statement for the record, if I may. These cross sections which are shown in red on Exhibit 40, were also connected by a lengthwise section running along the backbone of the structure, as dotted on this map, and by mistake, it has not been colored red. It should also be colored red as indicating a tie between the cross sections.

Q. There is then running down through the heart of the map, Mr. DeWolf, a dotted line which intersects the red cross lines all the way down, is that the line you have referred to?

A. Yes, that's right.

Q. Now, with reference to your map 40, does that cover the whole anticline?

A. No, that is the south half of it.

Q. So, it would correspond to Exhibit 1-A as far as area is concerned?

A. Yes. I may say the geophysical work did go [300] further north, and include work—it came up about that far (indicating).

Mr. Lamey: How far is that?

A. To the north line of Township 9 North.

Mr. Erickson: The south line of Unit 3 and the North line of Unit 4.

Q. And I believe your testimony then was that as to the structural features at the Woods Unit, Number 6, your geophysical work indicated that was

(Testimony of Frank W. De Wolf.)

an approximation of what the sub-surface was, is that correct? A. Correct.

Q. As to this matter of migration, Mr. DeWolf, is it not a fact that the recent studies on the part of geologists indicate that migration is not as extensive in those subterranean beds as thought in the early days?

A. Well, we have some new kinds of traps we are talking about nowadays, stratographical traps which are caused by the pinching out of porous beds where they become impervious or bump up against obstructions that tend to seal in any oil that is there just as effectively as a dome would. Therefore, oil might arise and be trapped in that sense. I think migration is still a great factor where beds are sloping as they are here.

Q. Twenty years ago, geologists generally would have believed in looking at this structure that oil in the lower sands would migrate freely up and down the structure, so that oil [301] in Unit 6 might have some effect as to drainage at a very great distance away, is that correct?

A. Yes, in general, but I would like to say if the backbone is flat, the backbone isn't rising much, the friction in the rocks might check the oil, and if it is a slightly dipping bed, it might migrate up, but on a flat back structure, like the roof of a house, for instance, it might not migrate the full distance.

Q. You are testifying now with particular reference to this Cedar Creek Anticline?

A. Yes. There was a question whether that back-

(Testimony of Frank W. De Wolf.)

bone would check the migration. That was mentioned in my report, the possibility we might, that we might have individual fields there; but I may add this: As a rule a closed structure, weaker than 200 feet of closure, if you know what that means, is not likely to be significant in the Rocky Mountain region. Our known fields in the Rocky Mountain region mostly have closures greater than 200 feet, and these little domes on here don't have. None has more than 100 feet, I don't believe.

Q. In your opinion as a geologist, would the drilling of a producing oil well in the Little Beaver dome be any indication that you might get similar results in Unit 5?

A. It would be encouragement for any place along that backbone.

Q. But that would be the extent of the value you would give [302] to a successful well there, is that correct—I just want to have——

A. You would have a possibility of production, yes, and particularly, of course, with the pinching out of beds and the Big Snowy section developing, the whole thing is wide open.

Q. Do you know of the drilling of the Stanolind well in Section 15, 9 North, 58, which would be just above where your map leaves off and where Exhibit 1 begins?

A. Is that a modern, recent well?

Q. Yes, within the last——

A. No, I don't know nothing about it.

Q. If I were to tell that well was drilled in Sec-

(Testimony of Frank W. De Wolf.)

tion 15, 9 North, 58, to a depth of 9649 feet, and the well was a non-producer, was dry, what effect would you say that would have on an evaluation of Unit 5, which is the one that joins?

A. I couldn't answer that offhand.

Q. Would it indicate that there was then in between Unit 5 and the Cabin Creek Unit up here (indicating) a syncline?

A. I don't know. I haven't seen the log, and I would have to study that before I could answer it. Did it go to the granite, what beds did it reach?

Q. It went through the Ordovician, and found the Ordovician 299 feet lower in Section 15, Township 9, Range 58 than it was in the Cabin Creek area.

A. I am not competent to answer that, I am afraid. [303]

Q. You made some reference to your participation in the location of the Warren well. Did you recommend that location without regard to any contract commitments that the Montana-Dakota Utilities or Fidelity Gas might have had?

A. No, I can't say that I did.

Mr. Lamey: Mr. DeWolf, do you have that first report with you? Counsel would like to see it.

A. Yes, this is it.

Mr. Erickson: The only thing I have left to ask Mr. DeWolf would be about this report. I wonder if we could have a few minutes so I could take a look at it?

(Testimony of Frank W. De Wolf.)

Court: Yes. Court will stand in recess until 10 minutes after 11. That will give you 15 minutes.

(15-minute recess.)

Q. Returning again to the Stanolind well, and for an expression of an opinion on your part as a geologist, if the record shows that the Stanolind well was drilled, as indicated, in the area just north of where you completed your work, and if it were shown by the testimony that the Ordovician at that point, the Ordovician being producing sands, if the records show that in the well just north that is 299 feet lower, what would that indicate to you as to the effect of a successful drilling in Cabin Creek, with relation to the area in Unit 5, with the added fact that the well was a non-producer in the Ordovician? [304]

A. This location, as counsel has shown it on the map, is right on the steep side of this anticline, right on the steep flank where the contours are very close together. If this were literally true, it would be bound to be a low well. It starts low.

Q. Assume the Ordovician where production was 299 feet lower in this well, and the Ordovician there, it was non-productive, the combination of the fact it was lower and non-productive, what would you say as to your opinion as to whether the Shell wells in the Cabin Creek Unit, because they are productive, would that be any indication that similar drillings in Unit 5 down there, with the same relative location along the sharp—

A. I think it would have a chance, yes, surely.

(Testimony of Frank W. De Wolf.)

Q. What do you mean by that?

A. This may be just an isolated low well, and south of it in Unit 5, conditions may be more favorable, I should think.

Q. That's right, but by reason of the results that are found in here, would successful development of these wells (indicating) tend in any manner to prove or disprove the fact there might be successful drilling in Unit 5?

A. I think so.

Q. In what way?

A. Because you have got another high structure, another one of those little domes there under "8", and it is on the trend. This other thing, I think, is off the trend, to the west of it, [305] isn't it?

A. The well was drilled in the northeast quarter of the northwest quarter of the section, and the red dot, which is on Exhibit 1 right opposite the words "Cabin Creek Unit" would be an approximation of the location.

A. I wouldn't like to be too opinionated about that hypothetical question, it is a little complicated.

Q. Would it tend——

Mr. Lamey: May it please the Court, I have not objected because I realize we have an expert witness here, but I am now going to object that any further questions along this line, based upon facts assumed by counsel and not established as facts in evidence, ——

Mr. Erickson: We will introduce that testimony later. I understand Mr. DeWolf is going to leave. He has given his expert opinion that it is all one

(Testimony of Frank W. De Wolf.)

structure and operation in one area. I really intend to prove another area.

Court: On your representation that you will present the facts with reference to your question, then, I will permit you to proceed with the examination.

Q. If the facts are as represented as to the Stanolind well, can you say whether that would tend to indicate one way or the other whether there is a definite change of structure, or rather that the Cabin Creek area, Unit No. 2, is not the same structure as Unit 5 insofar as the lower sands are concerned? [306]

A. I think the location of the Stanolind well is very unfavorable; it doesn't prove anything. It is deep down on the west side.

Q. If the testimony shows another well was drilled, the McDonald well, which is in Section 26, the southwest quarter of the southwest quarter of 26, 58, 10, was drilled to the Ordovician, and it also was non-productive, having reference to its location, would that have any bearing on your opinion as to whether or not there might be some difference structurally between the area in Number 2 and the area in Unit 5?

A. I should like to say that before anyone could answer that question, you would have to compare the log of that well with the logs of those producing wells just to the west of it and see whether the strata are the same, and whether you haven't slipped off the structure to the east into a low place.

(Testimony of Frank W. De Wolf.)

Q. Your testimony, insofar as the geophysical work upon which you were relying on, it did not extend up into Township 9?

A. What did not extend, the geophysical work?

Q. Yes.

A. Yes, it extended to about the north line of 9. I will show you——

Q. That is a sufficient answer.

A. It extended to that point there (indicating).

Q. Which would be on the north line of Township 9, Range 58? [307]

A. That is the extent of it, yes.

Q. Now, in going all through your report, Mr. DeWolf, I find that it was limited to and discussed only certain sands, and didn't include the Ordovician. Did your study eliminate the Ordovician?

A. The Ordovician was at such a great depth back in 1935, I wouldn't dream of spending the money to drill to the Ordovician. I rather recommended in that report that they stop at the bottom of the Sundance formation; I didn't dream of going to the Ordovician.

Q. Tell us approximately what the Sundance depth would have been in your study?

A. I could tell you what it was on the N.P. No. 1 well as reached.

Q. What is that depth?

A. Pardon me, I'll look at the log. The top of the Sundance in this log was at 4025, that is the N.P. No. 1; the top of the Sundance, as stated, was interpreted to be at 4025, and the bottom of it and

(Testimony of Frank W. De Wolf.)

the top of the Spearfish, so-called, at 4586, about that, question mark.

Q. The log of the N.P. No. 1 well didn't show anything on the Ordovician, did it?

A. It probably did not reach the Ordovician. We didn't know for sure whether it was Devonian or Ordovician. We didn't know.

Q. One more question, Mr. DeWolf. On this map, in terms of [308] geology and in terms of oil well drilling, some wells are classified as wild cat. You are familiar with that, of course. Now, if you drill on this high and find production, and know it is a separate high, for example, the one in Unit 5, 30 miles away, how would you classify the new well?

A. Very problematical, no assurance as to its success. In that connection it might be called a wild cat, but it has got a reason for location. Many, many wild cats are just a stab in the dark without any reason for location.

Q. Did you write any letters to the Fidelity Gas Company after the completion of the Warren well concerning this general problem of development of the geological features of the Cedar Creek Anticline?

A. I don't know.

Q. At least you have none with you, is that correct?

A. That is correct.

Q. Do you have any written recommendation to the Fidelity Gas Company as to the drilling of the Warren well with you?

(Testimony of Frank W. De Wolf.)

A. I have my original recommendation of the location, yes.

Q. Do you have that there? A. Yes.

Q. May I look at it?

A. I would be glad to show it to you. There is a—do you want me to read that?

Q. May I look at it first and then determine whether we need [309] it in the record? Thank you, Mr. DeWolf. Did you have any oral discussion with Mr. Smith or anyone else at Fidelity Gas after the Warren well was completed concerning it, Mr. DeWolf?

A. Yes, we followed the drilling of the Warren well and followed the samples and discussed it as we had discussed all the other wells as the work went on.

Q. Did you recommend additional drilling in Unit 5 after the well was completed?

A. No, I wasn't asked to.

Q. You gave no opinion to the Fidelity Gas as to whether further drilling in Unit 5 would be warranted?

A. I don't know, that having been 20 years ago, I don't know.

Q. If you did, you don't recall it?

A. I don't, no.

Q. How long has it been since you have worked professionally for Fidelity Gas in connection with this field?

A. Montana-Dakota Utilities Company, I haven't

(Testimony of Frank W. De Wolf.)

worked for them since this work was finished, whenever that was, what was it, 1937, 1938.

Mr. Erickson: I believe that is all.

Mr. Lamey: That is all.

Court: The witness may be permanently excused?

Mr. Lamey: Yes, your Honor.

Mr. Erickson: He may. [310]

(Witness excused.)

HERMAN F. DAVIES

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Lamey): State your name and residence?

A. My name is Herman F. Davies; my residence is Oakland, California; my office is at San Francisco, California.

Q. What is your occupation at the present time?

A. I am President of the California Exploration Company, a wholly owned subsidiary of the Standard Oil of California.

Q. And how long have you been president of that company? A. About six years.

Q. And as president, in what phase of the oil industry do you deal?

A. We are primarily concerned with exploration work in foreign countries.

Q. And are you a geologist by profession?

(Testimony of Herman F. Davies.)

A. Yes.

Q. Where did you receive your formal education in Geology?

A. I received my Mining Engineering Degree in Geology at the University of Minnesota in 1921, and my Master's Degree in Geology at the Massachusetts Institute of Technology in 1922.

Q. And did you work at your profession?

A. Yes, I joined the California Company, another subsidiary [311] of the Standard here in Billings in 1923. I spent 18 years in the Rocky Mountain District. I was Junior Geologist to commence with, District Geologist from 1930 to 1936, manager of the northern division with headquarters at Denver from 1936 to 1941, Vice President of the California Company from 1941 to 1942, in charge of exploration and development. Since 1942, I have been primarily concerned with foreign developments and exploration.

Q. Now, were you in Billings in connection with your work for the California Company in 1935 and 1936?

A. Living here you mean?

Q. Yes.

A. No, my residence and headquarters office was at Denver. The Denver office covered all the Rocky Mountain District at that time.

Q. In about the summer of 1935, did you have occasion to become acquainted with the Cedar Creek Anticline, which is indicated on the maps, Exhibits 1 and 1-A on the wall?

A. I became acquainted with the Cedar Creek

(Testimony of Herman F. Davies.)

Anticline back in 1923, did some work out there in a very preliminary way, and followed its development, as you will, in connection with oil exploration. Specifically, we did become interested in the Cedar Creek Anticline in 1935 when we made contact with the Montana-Dakota Utilities Company and commenced negotiations to work out a joint venture deal with them. [312]

Q. Do you recall the commencement of the drilling of the N.P. No. 1 well in the Little Beaver area?

A. I recall it started either in the summer or fall of 1935, yes.

Q. Did your company, and under your supervision, have any connection with the well, I mean as far as observing it and having a representative present?

A. While we were negotiating with the Montana-Dakota, they furnished us this geophysical work that Dr. DeWolf referred to. We also made a preliminary examination of the geological literature. While the well was drilling, we had a development superintendent, Mr. Charles Potter, and a geologist, Mr. Bremner at the well, Carl St. John Bremner. They spent approximately 60 days there while that well was being drilled; as I recall, it would be about September and October. We were unable to reach an agreement with the Montana-Dakota in regard to deeper development and negotiations were discontinued.

Q. Mr. Davies, I show you Defendants' Proposed Exhibit 41, purporting to be a letter dated

(Testimony of Herman F. Davies.)

June 11, 1936, to R. M. Heskett. I will ask you whether or not you signed the letter?

A. I did.

Q. And does that bring to mind a phase in your negotiations with Montana-Dakota Utilities and Fidelity Gas Company in connection with the acreage on the Cedar Creek Anticline? [313]

A. Well, yes, of course that acreage was involved in our original negotiations in 1935, and we resumed negotiations again in the spring of 1936.

Q. In 1935 when you first began your negotiations, were you made acquainted with certain rights held under Fidelity operating agreements and other agreements that Fidelity and other M.D.U. companies may have had? A. That is correct.

Q. What is your recollection as to the extent of those interests in the Cedar Creek Anticline?

A. My recollection is that they are essentially as represented on this map here in the eight units, covering in general the south two-thirds or three-quarters of the Baker-Glendive Anticline.

Q. What have you to say as to whether or not they included lands shown on Exhibit 1-A in Unit 5, there marked with pink?

A. They did include that, yes.

Mr. Lamey: We offer Exhibit 41.

Mr. Erickson: No objection.

Court: Very well, it is admitted.

(Defendants' Exhibit 41 admitted in evidence.)

Q. You may keep that just a minute, Mr. Davies,

(Testimony of Herman F. Davies.)

to refer to. On or about June 11, 1936, the date of Exhibit 41, will you state whether or not negotiations were resumed on behalf of the California Company with Mr. Heskett and other officials of [314] Fidelity?

A. That is my recollection that we did, yes.

Q. Now, at that time, what type of development was your company interested in?

A. Well, commencing about 1935, our company became quite interested in what is now known as the Williston Basin, and we were very much interested in the Paleozoic formations which occurred in the Williston Basin of Western North Dakota and Eastern Montana, Alberta and Saskatchewan. We took up considerable acreage during that period from 1935 to 1937 on a number of structures in Montana, Alberta and North Dakota. We drilled a deep well in North Dakota, which had as its primary objective the Mississippian and Devonian and Ordovician. We likewise drilled a well in Alberta with the same objectives and contributed to a well at the east end of the Cat Creek Anticline.

Q. Were you interested in the possibilities of drilling a well in the Cedar Creek Anticline to the same formations? A. Yes, we were.

Q. And on that basis, did you resume negotiations with the Fidelity officials on or about June 13, 1936? A. We did.

Mr. Erickson: To which we object on the grounds it is immaterial, irrelevant. The statement has already been made by counsel that the negotiations

(Testimony of Herman F. Davies.)

resulted in no contract. It [315] wouldn't serve to illustrate any issue in this case.

Mr. Lamey: We intend by this witness to carry on the same negotiations up until January of 1939. We think it is material, particularly with reference to abandonment, for it was during the period of 1937 and 1938 the witnesses testified they were told they were all through.

Court: Very well, proceed. The objection is overruled.

Mr. Lamey: I think that question was answered.

(Question and answer read back by Reporter.)

Q. All right, and following that, do you recall that Fidelity went ahead with the drilling of the Warren well in Unit 5 and the Smith No. 1 in the Little Beaver area?

A. If I remember correctly, at the time we resumed negotiations in 1936, the Smith, or the N.P. No. 1 well had reached the Mississippian. It was the intention of Montana-Dakota Utilities to drill a well on Unit 5 to test the Amsden formation and the Mississippian, and they approached us as to whether we would be interested in such program. It was the opinion of our geologists at that time that we were primarily interested in testing the pre-Mississippian formations, namely, the Devonian and Ordovician, and as the Montana-Dakota Utilities Company was not willing to deepen the N.P. 1 well at that time, we withdrew.

Q. Now, later did negotiations resume?

(Testimony of Herman F. Davies.)

A. Yes, following the drilling of the Warren well and the [316] Smith well, which I believe reached the Mississippian, we again approached the Montana-Dakota Utilities Company with the idea of entering into a joint venture with them, including all the acreage that they held on the Baker-Glendive Anticline for the purpose of drilling a deep test to the Devonian and Ordovician.

Q. About when was that?

A. That was, if I recall correctly, the fall of 1937 and all of 1938 and up until January, 1939.

Q. And during the period from the fall of 1937 until later in 1938, did you, on behalf of your company, carry on bona fide and serious negotiations with Fidelity with reference to these lands in which they had interests in the Cedar Creek Anticline?

A. Yes, we not only carried on negotiations, but in the fall of 1938, during the months of October and November, we carried on geophysical seismic work.

Q. Subsequently was the matter submitted to the Board of Directors of the California Company for which you were working?

A. That is correct.

Q. About when was that?

A. That was in December, 1938, I believe, or early January, 1939.

Q. And following that—strike that question—I will show you now Defendants' Exhibit 42, and ask you if you can identify [317] that letter?

A. Yes, it is my signature.

Q. Was that the document through which you

(Testimony of Herman F. Davies.)

informed the officers of Fidelity that your company had decided against going into the agreement?

A. This letter is addressed to Mr. Heskett as Vice President of Montana-Dakota Utilities Company, and through him we advised that we would not be interested in continuing negotiations.

Q. Let me show it to counsel. During this period from the fall of 1937 in to late 1938, with whom were you carrying on negotiations?

A. Primarily with Mr. Heskett and Mr. Cecil Smith.

Q. And during the period of these years, 1935 into 1938, did you have occasion to visit Minneapolis frequently?

A. Yes, I was there several times. It so happened my family lives there, and furthermore, we were carrying on a very active leasing campaign in North Dakota, and much of that land was in the hands of the bank at St. Paul, so it was necessary to go back and forth quite frequently to carry on negotiations in regards to that land, and naturally, I stopped in to see Mr. Heskett or Mr. Smith at the same time in order to keep our negotiations moving in connection with the Cedar Creek Anticline.

Mr. Erickson: No objection.

Mr. Lamey: We offer Exhibit 42. [318]

Court: It is admitted.

(Defendants' Exhibit 42 admitted in evidence.)

Q. Now, I have understood you to say that your company did some geophysical work on portions of

(Testimony of Herman F. Davies.)

the Cedar Creek Anticline during the latter portion of your negotiations, is that correct?

A. That is correct.

Q. And was your company interested in taking over interests on the entire anticline? A. Yes.

Q. You spoke awhile ago of the Baker-Glendive Anticline. I would like to ask you if that is the same as the Cedar Creek Anticline?

A. That is correct, in the early days in the coal surveys, it was referred to as the Baker-Glendive anticline. Later the name was changed to the Cedar Creek Anticline.

Q. And what was there about the Cedar Creek Anticline that caused your company to be interested in all of the acreage that could be turned over by Fidelity and others?

A. Well, naturally, if one was to drill one portion of the structure, such as down in Unit 8, and it was productive, they would be interested in trying to develop oil all along the anticline, and the time to control acreage is before a well is drilled, and we are rather land hungry at times, and naturally we like to have all the land we can get. [319]

Q. Why was it your company finally, in January, 1939, withdrew from further negotiations and the entering into the contract?

A. Primarily for two reasons, one, we were unable to reach terms that we considered entirely satisfactory, and secondly because of the general marketing conditions of our company and the general area.

(Testimony of Herman F. Davies.)

Q. By marketing conditions, do you mean the marketing of crude or gasoline?

A. The marketing of crude, yes.

Q. Explain that just briefly?

A. Well, as you all know, the Cedar Creek Anticline, at least back 20 years ago, was relatively uninhabited, a relatively uninhabited area. The demand there for gasoline and production were much less than they are today, and in order to market any crude from that area, you would either have to have enough which will justify a pipeline, we will say to the Twin Cities, or a smaller amount which would necessitate building a local refinery, and our economists came to the conclusion that the pay out on a small refinery would be so long it was unattractive, and the investment in order to develop a sufficient amount of crude to justify a pipeline to the Twin Cities was more than they wanted to undertake at that time.

Mr. Lamey: You may cross examine. [320]

Cross Examination

Q. (By Mr. Erickson): With reference to the last questions and answers, it is true also that the price of crude was very low at that time, is that correct?

A. Correct.

Q. Do you have with you Mr. Davies the various proposals and counter-proposals having to do with the second series of negotiations you carried on with Montana-Dakota Utilities?

A. No, our company follows the policy of de-

(Testimony of Herman F. Davies.)

stroying most of its correspondence after a period of years. That correspondence has been destroyed.

Q. Your letter of the 9th of January, 1939, Defendants' Exhibit 42, in the first paragraph, says, "I presented to the San Francisco office our entire plan for future development of the Cedar Creek Anticline along the lines discussed with you, namely, a 75-25 split." What does that 75-25 split refer to?

A. The type of agreement we were discussing at that time was that we would receive 75 per cent of the net proceeds and Fidelity and Montana-Dakota would receive 25 per cent, as I recall.

Q. Now, do you know how you arrived at a determination of what were the net proceeds in the negotiations, if there were any, if there were any net proceeds? [321]

A. I can't give you the details now; I haven't seen that contract for 15 years.

Q. Do you recall that consideration was taken of the existence of the Fidelity gas agreement in trying to work out what would be the net proceeds?

A. As I recall, there were two agreements, one with Fidelity and one with Montana-Dakota Utilities.

Q. But so far as you can now recall, the 75-25 was a net proceeds split?

A. That is the way I remember it, yes.

Q. Do you recall whether in arriving at the net an account was taken of the amount of royalties to be paid to the holders of the fee and Federal Government?

A. I don't remember.

(Testimony of Herman F. Davies.)

Q. Can you recall who made the 75-25 proposal?

A. No, most of those proposals are by horse trading, we come to them by bargaining. I don't know who initiated or who first suggested 75-25.

Q. With relation to this breaking off of negotiations, do you recall whether one of the reasons for breaking off negotiations was this 75-25 split?

A. I can't answer that question, no.

Q. You can't recall now whether there was agreement between the parties on the 75-25, is that correct?

A. Which parties? [322]

Q. You and Fidelity and you and Montana-Dakota Utilities.

A. We were negotiating along those lines; we hadn't reached an agreement that had been executed.

Q. But, so far as the 75-25, you had generally agreed on that feature of it, is that correct?

A. I think so, at least in principle.

Q. Do you recall how the cost of drilling was to be handled under the various proposals?

A. If I remember correctly, we were to first spend enough money to equal the amount spent by Montana-Dakota Utilities, which was somewhere between three and four hundred thousand dollars on Unit 8, and I don't recall the amount in Unit 5. After having equalled that amount, then I believe the expenditures were either—this I don't remember, whether it was 50-50 or 75-25, but I think it was 75-25.

Q. Now, why are you sure now that the negotia-

(Testimony of Herman F. Davies.)

tions, in view of your inability to remember some of these details, included the lands that are marked in red, the specific lands marked in red in Unit 5?

A. Attached to our agreement there was an exhibit which included all the lands; furthermore, there was a summary of the acreage, which indicated all of Unit 5 was included.

Q. You don't have that summary?

A. I don't.

Q. You don't have the map either, I understand?

A. No.

Q. Now, the proposal that had the map, was that in negotiation between you and Fidelity or between you and Montana-Dakota Utilities?

A. I didn't hear the question.

(Question read back by Reporter.)

A. We were negotiating with both of them.

Q. But the negotiations were separate as to the two companies, is that correct?

A. If I remember correctly, yes, but we were negotiating with the same individuals.

Q. Yes, but in the negotiations, there was recognized a difference between the acreage owned outright by M.D.U. and that which it held under Fidelity, is that true? A. Correct.

Q. Now, you have indicated that you did a considerable amount of seismic work there, and you also indicated your primary interest was, did I understand you to say the pre-Mississippian?

A. Correct.

Q. Can you tell us what the results of that seis-

(Testimony of Herman F. Davies.)

mic work were as to your conclusions concerning the desirability of drilling to the greater depths?

A. We were primarily interested in learning by this seismic work whether the Smith well and the N. P. well were properly [324] located on the lower horizon structurally, or whether it would be necessary to drill a separate well, and I think, as I recall, it proved the N.P. and Smith were satisfactorily located, and it was a matter of deepening one or the other, depending on which was in the best mechanical condition.

Q. I believe you testified your negotiations with Montana-Dakota Utilities or Fidelity looking toward the deepening of those wells was not successful, is that correct?

A. Not successful as to terms, yes.

Q. It was your inability to get together on terms that prevented you making a deal on those wells, is that true? A. In part.

Q. Were there any similar negotiations as to the Warren well?

A. Not except it was included in all the acreage involved.

Q. But there were no negotiations on the Warren well as to deepening it, is that correct?

A. We had that option.

Q. But those negotiations weren't of the same nature as the ones concerning N. P. No. 1 and Smith, is that correct?

A. I would say they were.

Q. That is what I wanted to find out.

(Testimony of Herman F. Davies.)

A. In this, it was all one part and parcel.

Mr. Erickson: That is all.

Mr. Lamey: No redirect. [325]

Court: May this witness be excused?

Mr. Erickson: He may as far as were are concerned.

Mr. Lamey: Yes.

(Witness excused.)

Court: Very well, Court will stand in recess until two o'clock.

(Noon recess.)

CECIL W. SMITH

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Lamey): Is your name Cecil W. Smith, and do you reside in Minneapolis, Minnesota?

A. My name is Cecil W. Smith, and I reside in Minneapolis.

Q. What position, if any, do you hold with the Montana-Dakota Utilities Company?

A. I am President of the Montana-Dakota Utilities Company.

Q. How long have you been such officer?

A. Since about the middle of 1954.

Q. And who held the office of President immediately preceding the date you mentioned?

A. Mr. R. M. Heskett.

(Testimony of Cecil W. Smith.)

Q. What office, if any, do you hold in the Fidelity Gas Company? [326]

A. I am Vice President of the Fidelity Gas Company.

Q. Who is president of that company?

A. I believe Mr. W. L. Hayes.

Q. What is your profession other than in this capacity as President of the one company and Vice President of the other?

A. I graduated from the University of Illinois as a Mining Engineer.

Q. When was that? A. 1913.

Q. And when did you first come with the companies, any of the predecessor companies of Montana-Dakota Utilities? A. In August, 1927.

Q. What did you do between graduation from the University and your employment with the Montana-Utilities group?

A. I worked with various coal companies in Illinois, with a subsidiary of the Steel Corporation, United States Steel Corporation, in Pennsylvania, with the Bureau of Mines in Pittsburgh, Pennsylvania.

Q. Now, with what company of the M.D.U. group did you first become associated?

A. The Minnesota Northern Power Company.

Q. And what became of that corporation, if you can say, please?

A. That corporation was merged into several of the subsidiaries, [327] I believe, in 1935, at which

(Testimony of Cecil W. Smith.)

time the Montana-Dakota Utilities Company was the resulting or surviving corporation.

Q. As a matter of fact, at that time, was there not quite a merger of smaller companies into the Montana-Dakota Utilities Company?

A. That is correct.

Q. Something has been said in the testimony thus far with reference to a company known as Gas Development Company. Will you tell us if that was one of the predecessor companies of Montana-Dakota Utilities?

A. Gas Development Company was the predecessor company, the company which originally acquired leases and carried on operations on the Cedar Creek Anticline, and was merged into the Montana-Dakota Utilities Company in about 1935.

Q. Am I correct in understanding that some of the early gas purchase agreements were made with this Gas Development Company?

A. That is correct.

Q. What about the gas unit agreements, such as has been marked here as Exhibit 3, were they with Gas Development or some other company?

A. I believe some of the early ones were with Gas Development Company.

Q. Do you know whether at the present time, and for some time, is it correct that all of the gas operations have been under [328] I will say M.D.U., instead of going to Montana-Dakota Utilities each time?

A. That is correct.

(Testimony of Cecil W. Smith.)

Q. What is the relationship of Fidelity Gas Company to M.D.U.?

A. Fidelity Gas Company is a wholly owned subsidiary of Montana-Dakota Utilities Company.

Q. What is its particular function in connection with the over all operation of your group?

A. It has carried on leasing and development activities.

Q. Is that both with reference to oil and gas?

A. That is correct.

Q. When did you first become acquainted with the operations in the Cedar Creek Anticline so far as your companies are concerned?

A. The companies' operations on the Cedar Creek Anticline began in 1926. I first became acquainted with the operations on the Cedar Creek Anticline in 1927, when I came with the Minnesota Northern Power Company.

Q. Now, what were the operations of the company at that time in general?

A. In 1926, gas development was started in the Cabin Creek area on the Cedar Creek Anticline for the supplying of gas to Glendive, Montana.

Q. Later on was there other development of gas throughout the [329] Cedar Creek Anticline?

A. Yes, in succeeding years.

Q. When?

A. It began in 1927, 1928, and was continuous from there on.

Q. Through what portion of the Cedar Creek Anticline did the gas development extend?

(Testimony of Cecil W. Smith.)

A. It gradually extended from what was called Unit 1 to the south end of the field, which is now designated as Unit 8-A as shown on the map.

Q. Now, where was this Unit 1 with reference to the Pine Unit as shown on Exhibit 1?

A. That is in the south end of the Pine Unit as shown on Exhibit 1.

Q. From what sand was gas being produced?

A. It was being produced from the Judith River sand.

Q. Did the Northern Pacific Railway Company have lands in that Cedar Creek Anticline at the period you just described? A. They did.

Q. And to what extent?

A. The Northern Pacific Railway Company owned every other section on the anticline with the exception of Township 8 North, Range 59 East, which is in Unit 5. The Northern Pacific did not own any lands in North Dakota where the structure extends beyond the State of Montana. [330]

Q. Were any of your gas development operations on N.P. lands back at that early time?

A. Yes, they were.

Q. To what extent?

A. They were to a considerable extent on the N.P. lands. One of the first gas leases which had been made was covering Northern Pacific lands in Units 2, 3 and 4.

Q. And later on, did you get other leases on N.P. lands in the other sections of the anticline?

A. I believe in 1928 we made a lease on North-

(Testimony of Cecil W. Smith.)

ern Pacific lands in the area south of Unit No. 5, and in some of the townships adjoining Unit No. 5.

Q. And was your company taking gas out of that area and distributing it somewhere in Montana and North Dakota?

A. In 1926, distribution was started in Glendive, Montana; in 1927, the pipe line was built to Miles City, and distribution started in Miles City and one or two small intervening communities between the Cabin Creek field and Miles City; in 1928, a pipeline was constructed from the Cedar Creek Anticline to communities in the north end of the Black Hills, where distribution of gas was started; In 1930, pipelines were built to Williston, North Dakota and Bismark, North Dakota, and gas distribution was started in those cities and in the intervening communities.

Q. Were you taking some gas at that time from the lands [331] involved in this action? By "that time" I mean these early years, 1926, 1928?

A. I believe that the only lands that were producing gas and that we were distributing were those of the Cedar Creek Oil and Gas Company, with which company contracts were made early in 1929.

Q. What have you to say as to the amount, proportionate amount of Government land in Unit 5?

A. Unit 5 consists largely of Government lands.

Q. What about Government lands throughout the Cedar Creek Anticline at this early date?

Mr. Erickson: To which we object because we don't believe it is relevant and material.

(Testimony of Cecil W. Smith.)

Mr. Lamey: I am trying to get a background. I don't intend to pursue it too far.

Court: Very well, you may answer the question. The objection is overruled.

A. A large portion of the intervening lands checker-boarded in with the Northern Pacific Railway lands in the structure were Government lands under which the oil and gas had been reserved to the Government.

Q. I believe it was Mr. Wight who testified about a situation that arose in Unit 5 concerning the payment of compensatory royalties on Government land. Would you know anything about that, back in the early '30's? [332] A. Yes, I would.

Q. Will you just explain what is meant by compensatory royalties in particular reference to Government lands?

A. Wells drilled on lands adjacent to Government lands were in operation in Unit No. 5, and the Government felt that their adjoining lands were being drained of gas, and they had computed, according to a formula that they used, and estimated the amount of drainage, and they had assessed against the owners of those lands a royalty to compensate them for drainage. That is what is meant by the compensatory royalty.

Q. Now, then, as against that, did not the permittee or licensee from the Government have the opportunity and right to go in and develop gas and sell it and then avoid the compensatory royalty?

A. Yes.

(Testimony of Cecil W. Smith.)

Q. Now, did that situation prevail early in 1934?

A. Yes, it continued for several years.

Q. Do you know why the gas from Government lands in Unit 5, at least those lands that may be involved in this action, was not being sold in 1934?

A. I don't know why it was not being sold, but I know we had made an effort to work out an arrangement to buy it.

Q. With whom? A. Mr. Wight.

Q. You mean John Wight who testified the day before yesterday? [333] A. That is correct.

Q. Were you successful? A. We were not.

Q. Do you recall a meeting in Billings with officials or representatives of the U.S.G.S. concerning this situation? A. Yes, I do.

Q. About when was that?

A. The early part of May, 1934.

Q. Do you know how that meeting came about?

A. As I recall, it came about through discussions which had been held with the U. S. Geological Survey with respect to the formation of a unit plan or some other plan for taking care of this drainage situation, and for arranging for a market for that gas.

Q. Had you requested such a meeting?

A. No, we had not requested such a meeting. As I recall, the meeting was called at the suggestion of the U. S. Geological Survey.

Q. You attended the meeting, did you not?

A. Yes.

(Testimony of Cecil W. Smith.)

Q. And who was present representing the U.S.G.S.?

A. Mr. H. J. Duncan, Supervisor; Mr. Paul Hegwer, who at that time was working on unit plans for the U. S. Geological Survey, and Mr. Perrigo, H. H. Perrigo, the U. S. Geological [334] Survey engineer stationed at Billings, and I believe one other representative of the Survey, I don't recall his name.

Q. And who was there representing the M.D.U. group?

A. Mr. Heskett, Mr. Raymond Hildebrand and I.

Q. And was John Wight present?

A. Mr. John Wight, Mr. George Norbeck and Mr. Huntington, their attorney.

Q. Do you mean Fred G. Huntington, an attorney of Billings?

A. Yes, he represented Mr. Wight and Mr. Norbeck.

Q. How long did that meeting last in Billings?

A. As I recall, it lasted two or three days.

Q. Now, at the meeting, was there discussions with reference to the gas unit agreement, which has been identified here as Exhibit 3, the gas purchase agreement, which has been identified here as Exhibit 4, and the Fidelity operating agreement, which has been identified as Exhibit 2?

A. Yes, those were all discussed and gone over with all parties.

Q. Now, coming first to the gas purchase agree-

(Testimony of Cecil W. Smith.)

ment, was there any limit agreed on the term of those agreements?

Mr. Erickson: To which we object because the agreement is in evidence and speaks for itself.

Mr. Lamey: I think there is one sample here, but there are many. I will withdraw the question and get at it this way—— [335]

Mr. Johnson: On that point may I say this: There is an exhibit introduced, and it was explained that that exhibit was not typical of all situations, that there were some short term agreements.

Mr. Erickson: My objection would stand.

Court: It is the agreement as between these parties.

Mr. Erickson: As to any of the agreements, they are reduced to writing, and there is no explanation why they are not here. I don't care, except I don't want this witness to testify to the terms of the agreement, with this one exception, if it is the purpose of Mr. Lamey to inquire if some are shorter terms than others, I am agreeable to that.

Court: Very well.

Q. On these gas purchase agreements with reference to the plaintiffs here, were they all for the same term of years as far as you recall?

A. Not with respect to all of these plaintiffs. The Cedar Creek Oil and Gas Company gas purchase agreements were made in 1929, and those are for the life of the lease. As to some of these plaintiffs, the term was set at five years. I believe some

(Testimony of Cecil W. Smith.)

of the land involved in the suit, I am not sure, may have been for a longer term.

Q. Were some agreements made at that time with John Wight or his company? A. Yes.

Q. I am talking about shortly after the Billings meeting. A. Yes.

Q. Do you know what the term of those agreements was normally?

A. Those were five year agreements.

Q. Was there a reason for that?

A. The reason given was that they were still working on building a pipeline, hoped to build a pipeline to Minnesota or somewhere else, and they did not want to foreclose their right to produce gas for their own group.

Q. By "they," you mean who?

A. Mr. Wight and his group.

Q. As a result of the meeting in Billings with the U.S.G.S., what was worked out with reference to this compensatory royalty problem?

A. An agreement was reached with Mr. Wight and his group, and it was approved by the supervisor, that prior to the effective date of the unit plan of operation in Unit 5, extra gas would be taken from the wells on the lands belonging to his group sufficient in amount to pay the compensatory royalties which had been assessed by the Government.

Q. And what was that amount, as near as you can remember?

(Testimony of Cecil W. Smith.)

Mr. Erickson: To which we object on the grounds it is incompetent and irrelevant.

Mr. Lamey: I think it came out of the same transaction and consideration that existed at the time for the execution of [337] these agreements, and the overall deal.

Mr. Erickson: The agreements were reduced to writing and recited the consideration.

Mr. Lamey: This is something in addition that occurred at the same time.

Court: Isn't that in effect what you have tried to foreclose the plaintiffs from showing in that regard?

Mr. Lamey: I don't think so, your Honor, this is something outside of any of these written agreements.

Court: Well, then, it has nothing to do with it.

Mr. Lamey: Except it is all entered into at the same time as part of the circumstances under which these agreements were executed, the same transaction.

Mr. Erickson: If it please the Court, in that situation, of course, we would feel we would have to reopen to go into the matter extensively because the agreements are here, and they are in writing, and this matter has not been pleaded.

Court: What is your purpose, what are you going to prove by this?

Mr. Lamey: I am going to prove that coming out of this meeting at Billings, and as part of the transaction—there has been testimony that some-

(Testimony of Cecil W. Smith.)

body had to sign the agreements because M.D.U., or its predecessor, was the only place they could sell the gas. This arrangement was worked out to take care of the compensatory royalty, and the company went ahead and took [338] extra amounts of gas from their lands so they could go ahead and pay up the compensatory royalties and keep the leases in standing, and the Government would then go ahead with the unit plan and its approval. I am offering it, your Honor, on the theory that all transactions arising out of one meeting where an agreement is made are admissible.

Court: Well, yes, if you have to explain something, but you have got your contracts here, and they speak for themselves, don't they?

Mr. Lamey: That was never put in the contract.

Court: Then it is not part of the agreement.

Mr. Lamey: We will withdraw it and go about it this way, I think, perhaps.

Q. Mr. Smith, following the Billings meeting, did you soon thereafter begin taking gas from some of the lands of the plaintiffs? A. Yes, we did.

Q. Was that before the unit agreement was approved by the U.S.G.S.? A. That is correct.

Q. And was it before the gas purchase agreements were actually signed up by the Wight group, if you know?

A. I believe the gas purchase agreements covering the lands on which the wells were connected were executed.

Q. The gas purchase agreements? [339]

(Testimony of Cecil W. Smith.)

A. Yes.

Q. What have you to say as to whether or not that was a greater or less portion of gas than the Wight group would have been entitled to receive under the unit operation plan?

Mr. Erickson: To which I will object on the grounds it is incompetent, irrelevant and immaterial, and for the further reason it is not the best evidence.

The Court: I think your objection is good. I will sustain it. That must appear from the contract itself.

Mr. Lamey: Well, I don't follow it. I think certainly before the unit agreement is finally executed and approved by the Government, we would be entitled to show what these companies did about taking gas over and above what they would have been entitled to under the unit agreement. They started immediately after the Billings meeting to take these extra amounts of gas to take up this compensatory royalty default.

Court: Pending the time——

Mr. Lamey: Before the unit agreement was executed and approved by the U.S.G.S.

Court: Very well, for that purpose.

Mr. Erickson: That obviously is part of a separate agreement. It is not a part of anything here before the Court.

Mr. Lamey: You are assuming it was in writing.

Mr. Erickson: I am assuming that it is a separate transaction before the agreement was made.

(Testimony of Cecil W. Smith.)

Court: It at least applies as to the circumstances when the agreements were entered into, and as to the conditions that then existed. You may proceed.

Mr. Lamey: Read the question.

(Question read back by Reporter.)

A. It was greater.

Q. By how much, if you know?

A. The sum total of about \$25,000.

Mr. Erickson: May it please the Court, I move to strike the last answer as not being fully responsive, and for the reason it isn't material or relevant to this case.

Court: Sustained. I don't see—that is not an answer to the question you asked.

Mr. Lamey: I think my question was—read it.

(Question read back by Reporter.)

Mr. Lamey: By how much was it greater. Now, I don't know whether I am foreclosed by the objection from that, or is the objection to the answer being in dollars, or something else?

Mr. Erickson: I would object no matter what the question for the reason the testimony is irrelevant, it has no place in this case that I can see, and for the further reason that there are obviously records and accounts, that it wouldn't be the best evidence.

Court: It seems to me the figure provided [341] for is determined by the agreements and contracts that were entered into.

Mr. Lamey: I can't, I guess, make myself clear, your Honor. This was not part of a written agree-

(Testimony of Cecil W. Smith.)

ment, gas purchase or unit agreement, except the understanding was that in this interim before the gas purchase or the gas unit agreement was approved by the U.S.G.S., they would go ahead and take some extra gas from these lands over and above what had been agreed upon informally at the meeting in order to take care of compensatory royalties that were delinquent. I want to show the company went ahead and took that, and that then the gas unit agreements were approved.

Court: Why is it important to you to prove that?

Mr. Lamey: I am trying to get the whole transaction. It was part of a very valuable consideration that moved to these plaintiffs of the Wight group, as opposed to the idea they were all against it, or were forced into it. That has been intimated.

Court: He did testify to that effect.

Mr. Erickson: By the statement of counsel, he says he wants to show greater consideration than recited in the contract.

Court: For that purpose I wouldn't accept it. The consideration is recited in the contract.

Mr. Lamey: That's right, I am not attempting to vary the contract. I am attempting to offset some of this testimony I have indicated, and I am certain it is in the record. [342]

Court: For the purpose of explaining the situation that exists as a result of Mr. Wight's testimony with reference to being forced into the situation and that sort of thing, you may proceed.

Mr. Erickson: May I have one further objection

(Testimony of Cecil W. Smith.)

added, that there is no proper foundation for the testimony.

Court: That may be.

Mr. Lamey: I think this witness knows.

Court: You had better lay a foundation with reference to where he got his knowledge, if he was present, and so forth.

Q. Mr. Smith, at that time were you in charge of that part of the operation for this Gas Development Company, predecessor of M.D.U.?

A. I was.

Q. Did you have immediate charge and knowledge of the amount of gas that was taken from these lands of the plaintiffs, particularly the Wight group, to take care of this compensatory royalty situation?

A. I did.

Q. You know that of your own knowledge?

A. That's right.

Q. Now, tell me about how much that was.

Mr. Erickson: To which we object on the ground no proper foundation is laid; obviously records are available, and it is not the best evidence. [343]

Court: It doesn't appear that it was a written contract that was entered into.

Mr. Erickson: He is asking as to amounts of payments and amounts of gas. There are obviously records on those, and this witness is not the best evidence without some showing the records are not available.

Court: I will sustain the objection on that basis.

Q. Now, about the gas unit agreement, what have

(Testimony of Cecil W. Smith.)

you to say as to the first unit that was set up in the Cedar Creek Anticline?

A. Unit number 5 was the first one that was set up.

Q. And was its boundaries discussed at the meeting in Billings? A. Yes, they were.

Q. In 1934? A. Yes.

Q. Who indicated or set the east and west limits?

A. Those were set by the United States Geological Survey and subject to negotiation between the parties. I believe there was considerable discussion at the Billings meeting as to the location, particularly the east boundary of Unit number 5.

Court: Pardon me. With reference to the last objection that was made, in considering it, I think counsel's objection goes to the best evidence rule, and that doesn't apply to a [344] situation of this kind. Because there is a record of a payment made, that doesn't make that record the best evidence. You can testify to it, an individual can testify to it. You may also offer the written record, but the best evidence rule applies only to a document, to a contract, for example, as to what its meaning is, what it contains. If you are trying to prove what the contract contains, then the best evidence is the contract, but when you are proving payments, you can prove it by evidence a dozen different ways, so the objection is overruled in that regard. You may proceed along that line.

Mr. Erickson: I have my objection on the foundation also.

(Testimony of Cecil W. Smith.)

Court: Yes, on the foundation, however, I have sustained your objection.

Q. All right. To get back to the unit agreement, now, what part did the U.S.G.S. have in determining the east and west limits of Unit 5?

A. Those were determined by the U.S. Geological Survey.

Q. And about the limits of the north and south side of Unit 5, who determined those?

A. Those were determined principally by the ownership of lands.

Q. Were those finally approved by U.S.G.S.?

A. Yes, they were.

Q. Was the U.S.G.S. particularly concerned with the north and south boundary, as to where they came? [345]

Mr. Erickson: To which we are going to object on the ground it is incompetent, irrelevant and immaterial, it wouldn't be binding on us in any way.

Court: Overruled.

A. No, the U.S. Geological Survey was not concerned about the north and south boundaries inasmuch as this was the beginning of the program to unitize the entire gas producing area.

Q. And what was the convenience of the parties concerned, including the plaintiffs and their predecessors, that dictated the north and south boundaries as finally established in Unit 5?

A. Well, the boundaries in Unit 5, as I mentioned before, were established principally by ownership, and Unit number 5 contained practically all

(Testimony of Cecil W. Smith.)

of the lands that Mr. Wight and his group owned. They had a few scattered pieces in other units, but this was the unit they were particularly interested in.

Q. And do I understand correctly that all of the land shown within Unit 5 did become a part of this gas unit operation? A. Yes, they did.

Q. Now, the exhibits show a number of other units up and down the anticline, I believe from 1 to 8, is that correct? A. 1 to 8-A now.

Q. And will you tell us in general about when they were set up and what they pertain to, that is, whether oil or gas or both? [346]

A. Unit number 5 was approved in, I believe it was about the first of November; it was approved prior to the first of November, 1934, when it became effective. Units 1, 2, 3, and 4 were approved at various times up until about 1936, I believe, or 1937. Those were all gas producing units with the provision that the owner further agreed to join other unit plans.

Mr. Erickson: To which we are going to object and move that the portion of the answer now be stricken as to further unitization.

Mr. Lamey: That is all right, I have no objection after the first sentence. Read back the first part of it.

Court: Very well, it may be stricken.

(Answer read back by Reporter.)

Mr. Erickson: My objection went to the language starting "with the further provision".

(Testimony of Cecil W. Smith.)

Court: That has been agreed to be stricken.

Q. All right, proceed.

A. Unit number 6 and Unit number 7 were approved, I believe, subsequent to 1936, probably in 1937. Units number 8-A and 8-B were originally Unit number 8, and Unit number 8 was originally formed as an oil unit and was subsequently displaced by Units 8-A and 8-B. Units 8-A and 8-B are oil and gas units both.

Q. Were all of those units approved by U.S.G.S.?

A. They were.

Q. At your Billings meeting was the Fidelity operating [347] agreement discussed and considered?

A. It was, it was gone over paragraph by paragraph.

Q. Was that in the presence of the U.S.G.S. men as well as the others? A. It was.

Q. Was Mr. Wight there?

A. Mr. Wight, Mr. Norbeck and Mr. Huntington.

Q. At the meeting on it and at its conclusion, were any arrangements made with Mr. Wight's group about getting the gas unit agreement and the Fidelity operating agreement executed by the land owners within Unit 5? A. Yes.

Q. What was the arrangement?

A. The arrangement was Mr. Wight would secure the execution of all of these agreements by the people that he represented.

Q. And did he carry out that arrangement?

(Testimony of Cecil W. Smith.)

A. He did.

Q. Now, what have you to say as to other agreements similar to the Fidelity operating agreement on lands up and down the Cedar Creek Anticline, do you have others outside of Unit 5?

A. Yes, we do.

Q. Can you give us a general idea of where they extend and the amount?

A. The Fidelity operating agreements were obtained on about 90 percent of the acreage on the structure, I would say, from [348] Unit number 1, to and including Units 8-A and 8-B.

Mr. Lamey: Perhaps I didn't follow, I am sorry. Will you read the answer?

(Answer read back by Reporter.)

Q. From Units 1, 2——

A. From 1 to 8-A and 8-B.

Q. Now, what is the situation as to any M.D.U. lands in the Cedar Creek Anticline being under the same Fidelity operating agreement?

A. The Montana-Dakota Utilities company executed the same agreement with the Fidelity Gas Company as all of the other parties executed.

Q. Have you continued the operation under the gas unit agreement in Unit 5 over this period of years?

A. Yes, it has been operated ever since November 1, 1934, under the unit agreement.

Mr. Erickson: I am sorry, I didn't get the question when Mr. Lamey asked it, so I didn't get a chance to object. Read the question, please?

(Testimony of Cecil W. Smith.)

(Question read back by Reporter.)

Mr. Erickson: No objection.

Q. And during the time that the gas unit agreement had been in operation, who had been taking the gas produced therefrom?

A. Montana-Dakota Utilities Company.

Q. And is that still the case? [349]

A. That is still the case.

Q. Now, will you tell us about what the situation was with reference to wells in Unit 5 at the time the gas unit agreement was approved, and then what has been done since by your company under the unit agreement in the way of development?

A. At the time the gas unit was formed, I believe that there were about six or seven wells in that unit from which we were producing gas under gas purchase contracts, and I believe there were about six, or possibly eight wells in that unit that had been drilled by Mr. Wight and his associates from which gas had not been produced. I don't recall the numbers exactly, it is 20 years ago.

Q. Were those wells then taken over as part of the unit operation of Unit 5?

A. Yes, they all were.

Q. And from what sand was the gas being produced from those wells?

A. From the Judith River sands.

Q. Has there since been production from any other sands?

A. Yes, there has been production since from the Eagle sands.

(Testimony of Cecil W. Smith.)

Q. Where is that located with reference to the Judith River sands?

A. It is about 600 feet deeper than the Judith River sands.

Q. Do I understand correctly that the Eagle sands are not under the same unit operation or unit agreement, is that right? [350]

A. The Eagle Sands are not unitized.

Q. There has never been a unit set up on those sands and the production therefrom?

A. That's correct—I would modify that statement. There has not been a participating area set up.

Q. Do you produce some gas from those Eagle sands?

A. Some gas from some of those Eagle sand wells.

Q. Now, there was some testimony yesterday about the Cedar Creek agreements. What have you to say as to when the gas unit agreement and Fidelity operating agreement were executed by Cedar Creek as related to other agreements of like character in Unit 5?

A. I believe those agreements were executed later than the other agreements in Unit number 5 by some four or five or six months.

Q. Did you ever have occasion to go to Faribault, Minnesota, to see Mr. Jirik in connection with the execution of those two agreements?

A. Yes, I went down to Faribault and had a meeting with Mr. Jirik and, I believe, his directors,

(Testimony of Cecil W. Smith.)

at the time we were negotiating the unit agreement and the deep test agreement.

Q. You heard Mr. DeWolf's testimony this morning with reference to his geological work in the Cedar Creek area, did you not? A. Yes, I did.

Q. On behalf of what company did you employ Mr. DeWolf to carry on his geological work, do you recall?

A. Well, I believe that it was on behalf of the Minnesota Northern Power Company that we made his employment.

Q. Was that another one of the predecessor companies?

A. That was the predecessor company of Montana-Dakota Utilities Company.

Q. At what cost to your company was the geological and geophysical work done which led to the development under the Fidelity agreement which has been described here?

A. It was approximately \$25,000.

Q. Now, were you in charge at the field when N.P. well No. 1 was commenced on or about August, 1935? A. Yes, I was.

Q. I think that has been designated by other witnesses on the map, and is it correct to say generally that that was in the Little Beaver area?

A. That is correct.

Q. What was the final depth of that N.P. No. 1?

A. 8186 feet.

Q. Was it put down all as part of one continuous operation, or separate?

(Testimony of Cecil W. Smith.)

A. No, there were two separate operations. The discovery of oil was first made at a depth, as I recall, of around 6740 feet. The casing was set at that horizon, and a series of [352] tests made to see if it were commercial. The well was acidized to try to increase production, and difficulties with water were encountered, and then drilling was subsequently continued and carried on from that depth until a depth of 8186 was reached, and another producing zone was encountered. Another string of casing was set in that well and production tests were carried on for a considerable period of time to determine whether that horizon could be made into a commercial producer.

Q. What was the overall cost of that N.P. No. 1 well? A. \$212,251.01.

Q. Now, when was this work done with reference to the commencement of the well, which I understand was about September, 1935?

A. That well was spudded in September 1, 1935. Preliminary work was done, work prior to that time, the installation of drilling rig, drilling equipment, building of roads, erection of equipment, that began during August, 1935.

Q. And when did you finally complete your work so far as setting casing was concerned at the deepest horizon?

A. The tubing was run on that well, pumping equipment was installed, and the drilling equipment was moved off on October 10, 1936.

(Testimony of Cecil W. Smith.)

Q. Were any tanks erected to receive oil that was produced? A. Yes. [353]

Q. How many, and tell me something of the character?

A. As I recall, there were three or four 250 barrel tanks erected at that time when pumping equipment was installed.

Q. Now, did you commence the Warren well in Unit 5 and the Smith well No. 1 about the same time?

A. The Warren well in Unit 5 was spudded in on October 22, 1936; the Smith well in Unit 8, at that time, was spudded in on October 25, 1936.

Q. How deep did you carry the Warren well?

A. 7360 feet.

Q. Was that a continuous operation, or one or two?

A. That was carried on in one continuous drilling operation.

Q. And what did you encounter in that well in the way of oil shows or production?

A. We encountered in that well at this approximate depth the same horizon that we had encountered in the N.P. well at 6740 feet, and we found that the horizon at the Warren well contained salt water and no oil.

Q. What did that well cost your company?

Mr. Erickson: We are going to object, your Honor, as being incompetent, irrelevant and immaterial. We will stipulate the well was drilled pursuant to the contract.

(Testimony of Cecil W. Smith.)

Court: Overruled. I think the Court will take a 10-minute recess.

(10-minute recess.) [354]

Mr. Lamey: What was the last question?

(Question read back by Reporter.)

A. There was no casing installed in the Warren well except surface casing. The cost was \$88,063.03.

Q. To what depth was the Smith No. 1 well drilled?

A. That was drilled to a total depth of 6811 feet.

Q. Was casing set in that well? A. It was.

Q. How many shows of oil did you discover or encounter in that well?

A. We encountered a saturated producing horizon at about 6780 feet, as I recall it. Casing was set at that depth and tests were made of that well over a considerable period of time.

Q. How long did your tests continue in that well?

A. My recollection is that drilling equipment was kept on that well, and swabbing tests were made. It was deepened to a certain extent down to the final depth after the original producing horizon was encountered. Water was also found in that well, and a series of plugging operations was carried on. The testing was carried on until August 17, 1937. Pumping tests and pumping operations were continued for, I believe, a year after that, until July or August, 1938.

Q. What about pumping tests on the N.P. No. 1 during that same period?

(Testimony of Cecil W. Smith.)

A. Pumping equipment was moved off of the Northern Pacific [355] well in March or April, I believe, of 1937. It was installed in the Smith well, and the Northern Pacific well was allowed to flow naturally as long as pumping tests were carried on in the field, which I believe was up to about August, 1938.

Q. Was anything more done on the N.P. No. 1?

A. No, there was nothing further done.

Q. What was the nature or type of oil that you encountered in these wells?

A. Oh, it was a paraffin—a mixed paraffin asphalt base, as I recall it, about a 32 gravity oil, which was a rather low grade oil at the time. It had, as I recall it, on distillation test, about 19 to 21 per cent gasoline.

Q. What effort did you make to sell the oil?

A. There wasn't any market for the oil at the time. The pumping operations were continued until the tanks were filled, and then production tests stopped.

Q. Was there water being produced with the oil?

A. The N.P. well flowed naturally about 12 or 15 barrels a day, and there was no water in that well. The Smith well produced large quantities of water. As I recall, the average production of oil per day was about 35 to 40 barrels, along with approximately 250 barrels of water per day on pumping.

Q. Did you attempt to use some of that oil in

(Testimony of Cecil W. Smith.)

your operation in Glendive in connection with your plant?

Mr. Erickson: To which we are going to object on the [356] grounds it is immaterial and irrelevant.

Court: Overruled.

A. We conducted some tests of that oil for the use as fuel in our electric generating plant at Miles City. At that time it was necessary to establish prices. It was agreed with the Northern Pacific and U.S.G.S. that 60 cents a barrel was a fair price for that oil at that time.

Q. Was it economically feasible or possible to produce those wells under the conditions you have related? A. No, it was not.

Q. Were either of the wells you drilled there commercial wells?

A. That was our final decision that they were not commercial.

Q. I don't believe I asked you to give the cost of the Smith well No. 1. I would like to have you do that now.

A. The final cost on the Smith No. 1 well was \$125,615.88.

Q. Now, this morning Mr. Davies testified about some negotiations that began in 1935 with Fidelity Gas Company and the other M.D.U. group with reference to some arrangement or interest or joint operation in these lands in the Cedar Creek Anticline. Did you know Mr. Davies at the time of these negotiations? A. Yes.

(Testimony of Cecil W. Smith.)

Q. At the time, what was your position with Fidelity and the predecessor company—pardon me, by that time I guess it was [357] M.D.U., was it not? A. By that time it was M.D.U.

Q. You were what, vice president?

A. No, I was not vice president until 1944. I had charge of the field operations for M.D.U. at that time.

Q. Were you in the field a good deal during the drilling and testing of these three wells about which you have been questioned just recently?

A. Yes, I was in the field a large part of the time.

Q. And about when did your negotiations commence with the California Company?

A. I believe it was about the time that the Northern Pacific well was started, about early in September, 1935.

Q. You heard Mr. Davies testify, did you not, as to the various stages of negotiation? A. I did.

Q. Is that substantially correct as you remember that? A. That is correct.

Q. Now, during 1937, what do you recall with reference to these negotiations with Mr. Davies or other representatives of the California Company?

Mr. Erickson: At this time we wish to object to the question and move to strike the last testimony of Mr. Smith with reference to these negotiations for the reason that the testimony already shows negotiations resulted in no agreement. [358] If

(Testimony of Cecil W. Smith.)

there had been an agreement of any kind, it would not have been within the terms of this contract. Anything concerning those negotiations are outside the issues of this case entirely. An examination of the contract shows that repeatedly the Fidelity Gas Company agrees to do certain things. There is a provision in the contract at the very end under which the contract may be assigned by Fidelity Gas, but repeatedly in the contract the obligation is assumed by Fidelity Gas to do various things. There are extensive provisions as to the manner of charging costs and what are proper expenses, and various items in here that show conclusively that Fidelity was to be the operator under this contract. It had no right to delegate that authority. It is a purely personal contract insofar as this phase is concerned, it is non-delegable insofar as this was concerned because there was no assignment here. This objection goes to evidence that will be offered concerning the so-called Carter well and the Husky well, and it is basic to our position.

Mr. Lamey: It is our position on this immediate testimony that it offsets and refutes the testimony of Jirik and Smith and several others that during 1937 and early in 1938, they were told by Mr. Heskett and Mr. Smith that they were all through out there. Now, I want to show where they actually went out and were actually negotiating to get somebody in to drill a well. I think it refutes and overcomes, or at least [359] conflicts with that.

Mr. Erickson: As far as the matter of abandon-

(Testimony of Cecil W. Smith.)

ment is concerned, I would have no objection to the testimony.

Mr. Lamey: One at a time, but when we come to that, we don't accept counsel's viewpoint that the only way Fidelity could do something down there was to go out and do it themselves.

Court: We will overrule the objection at this time for the purpose of refuting the evidence of abandonment.

Mr. Erickson: I wouldn't want to restrict myself as to that. I believe abandonment could occur no matter what the intention was if they didn't do the things required.

Court: That is your position.

Mr. Erickson: Yes. Very well, proceed.

Mr. Lamey: I don't know if the question was answered.

(Question read back by Reporter.)

A. These negotiations were carried on more or less continuously during that period of time. I believe Mr. Davies testified that they were very active in North Dakota during that period, and he made frequent trips to Minneapolis, and the terms of the agreement or possible agreement were discussed from time to time and efforts made to work out the final agreement.

Q. There has been introduced in evidence a letter Mr. Davies signed on behalf of his company on January 9, 1939, to the [360] effect that the Board of Directors had considered the matter and decided not to go ahead. Up until that time had you any

(Testimony of Cecil W. Smith.)

information and belief that the California Company was not ready to go ahead on an agreement if you could arrive at the final terms?

A. No, we had no indication that they would not go ahead with it.

Q. Mr. Smith, in 1940, did you carry on any negotiations with the Carter Oil Company with reference to these lands involved in the Cedar Creek Anticline, and particularly those under the Fidelity operating agreement? A. Yes, we did.

Q. And that also included lands in Unit 5?

A. It did.

Q. And those of the plaintiffs in this case?

A. It did.

Q. Do you know about when those negotiations began?

A. Oh, there were preliminary conversations in connection with those negotiations extending back into the latter part of 1939. Carter Oil Company were becoming active up in that area, and Mr. Nelson Ruth——

Q. Did those negotiations result in entering into a contract? A. Yes, they did.

Q. And pursuant thereto was a well drilled by Carter in the Cedar Creek Anticline? [361]

A. That is correct.

Q. I don't believe that that has been identified on the map. Will you point it out on Exhibit 1-A and tell us the legend or designation that appears on the map?

A. That well is shown in Unit 8-B in Section

(Testimony of Cecil W. Smith.)

19, Township 4 North, Range 62 East. The map designation is "Carter—N.P. No. 1."

Q. Will you tell me when that well was commenced?

A. That well was spudded in May 12, 1941, and was finally plugged and abandoned on January 8, 1942.

Q. Do you know the depth to which it was drilled?

A. Well, roughly about 91 or 92 hundred feet.

Q. There was some reference made in the testimony this morning, I believe, that that well was drilled to granite, is that correct?

A. That is correct.

Mr. Erickson: May I have a continuing objection with relation to all of the testimony on the Carter well and Husky well on the grounds heretofore stated, it is immaterial and irrelevant, that it is outside the issues of the case, and I do make that objection to the testimony now.

Court: It is being offered with reference to this question of abandonment, is it not?

Mr. Lamey: Abandonment. I also propose to produce these agreements we have on this well and show that it is a well [362] being drilled through the efforts and in cooperation with Fidelity Gas Company. I think it goes to abandonment, and perhaps any other question that may arise under the issues.

Court: I don't know there is any other question to which it can go offhand, but it seems to me it

(Testimony of Cecil W. Smith.)

certainly is relevant to the question of abandonment, if activity any place beside Unit 5 can be considered. That is something you are going to have to argue in your briefs.

Mr. Erickson: The only thing I am interested in is that I not get here in a position where I let evidence go in without objection.

Court: While I haven't specifically said I will reserve ruling on these matters, the fact of it is I will reserve ruling on these objections so you can argue them to me in your brief. In other words, your position, Judge Erickson, is that any activity done on Unit 1 doesn't constitute evidence of non-abandonment of Unit 5?

Mr. Erickson: That is correct.

Court: Or upon Unit 8 or some other place, and while I am not ruling on that at this time, you see, I want you to argue that matter to me later, so the effect of my rulings is actually I will reserve ruling on the objections and let in the evidence, then you argue the matter later.

Mr. Erickson: That is the reason I asked for a continuing objection. I didn't expect a ruling. I want to be sure [363] I wasn't in the position of saying all of the testimony relative to Husky and Carter could be let in.

Court: I will understand that, and you will be given an opportunity to argue any and all of these questions with reference to the admissibility of evidence in your briefs, and the decision can then be made.

(Testimony of Cecil W. Smith.)

Mr. Erickson: May I add one point to the objection? Not only do we take the position that drilling done there has nothing to do with Unit 5, but we also take the position it is not drilling in compliance with the agreement.

Court: Yes, I understand that, and you may argue those points. Proceed.

Q. Were you in close touch with that well during the time it was being drilled?

A. Yes, I got daily reports on progress.

Q. And do you know what was encountered in that well in the way of oil shows, if any?

A. Oil shows were encountered in that well in about three different zones, I believe.

Q. Was any oil ever produced from the well?

A. No, there was not.

Q. Was it commercial?

A. The well was drilled during the war——

Mr. Erickson: May I object to the answer being obviously not responsive. [364]

Q. I asked if the well was commercial.

A. The well was not commercial.

Q. Explain, if you will, what the situation was with reference to oil, whether it was just shows or pumping of oil or what?

A. They had two or three good shows of oil, and I believe that there was a test made, on one of the drill stem tests, it was estimated they had about 200 barrels a day production, but due to the shortage of materials, the casing was only cemented with 100 sacks of cement, so when they started to perforate,

(Testimony of Cecil W. Smith.)

large quantities of water were encountered. It was impossible to shut it off properly. When the water was shut off, oil was shut off as well, so there never was a complete test made of any horizons that were penetrated.

Q. Was the well finally plugged?

A. It was finally plugged and abandoned.

Q. When was that?

A. It was plugged and abandoned on January 8, 1942.

Q. Do you know the cost of that well? From your experience in drilling other wells and general experience with reference to drilling, what is your opinion as to the approximate cost of that well?

Mr. Erickson: To which we object on the ground it is incompetent, irrelevant and immaterial.

Court: Sustained. [365]

Mr. Lamey: May it please the Court, at this time we offer to prove by the witness on the stand that the cost of this well was approximately \$148,000.

Mr. Erickson: We object on the same ground.

Court: Well, he can prove that, it is quite all right with me, but not in the method you have asked him. You haven't laid any foundation for him to give an approximation or give an opinion, and furthermore, his opinion, there is no need for asking his opinion. It is a fact how much the well cost.

Mr. Lamey: Well, we have the facts. I agree perhaps I should lay more foundation. We know

(Testimony of Cecil W. Smith.)

the cost of the well through figures of the Carter Company.

Court: Well, all you have to do is call Carter Company in and prove it.

Mr. Lamey: They are not available.

Court: Well, you can't prove it this way.

Mr. Lamey: I think I can get his opinion of the cost of the well.

Court: I doubt it. You can go ahead and try, but lay a foundation. Obviously, you see, he tells us one well cost \$81,000 and another well cost \$150,000. Whatever it is, there is a great variation between the cost of wells.

Mr. Lamey: That's right, but the variation comes in whether you have casing in the well or not. [366]

Court: It may come from other reasons too, I suppose. You can go ahead if you want to, but the best way to do it and the proper way to do is call Carter in.

Mr. Lamey: I understand that, your Honor.

Q. What was the situation with reference to drilling from 1942 and during the duration of World War II?

Mr. Erickson: To which we will object on the grounds it is incompetent, irrelevant and immaterial.

Court: What is the question.

Mr. Lamey: I want to show——

Court: I didn't hear the question.

(Testimony of Cecil W. Smith.)

Mr. Lamey: The question was the situation during the period from 1942 during World War II.

Court: With reference to the ability of people to drill and operate?

Mr. Lamey: Yes.

Court: The objection is overruled.

Q. Do you know? A. Yes, I do.

Court: All of this, you understand, it is only material if the Court finally decides against you on the objections that you have continuing through here.

Mr. Erickson: On this particular matter, your Honor, I had in mind there is a provision in the contract for act of God and so on relieving them of obligations. There is no [367] foundation here to establish——

Court: This is still going to the question of abandonment, what the conditions were with reference to which they were operating.

Mr. Erickson: We may further note there is no pleading of excuse by reason of war conditions for failure to perform.

Mr. Lamey: Your Honor and counsel, I am sure that that is what the Court has in mind. It would save a lot of time, and I would like to expedite the matter too. Under the rules of evidence, I understand if the evidence is clearly inadmissible in a trial before the Court, the Court rules it out; otherwise, the rule under the Federal practice is to allow the parties to go ahead and put in the evidence and get a complete record of it, and then brief it and so

(Testimony of Cecil W. Smith.)

on, and I am sure we will save a lot of time if we can proceed on that. I don't want to offer evidence I think is clearly inadmissible. I believe under our theory the evidence is admissible.

Court: Counsel also wants to be sure that his record is clear and that he can rely upon it.

Mr. Lamey: I think he has objected to it and the Court has said he can brief it.

Mr. Erickson: The position I take is this: All day today I have refrained from objecting except on matters I think are material. Certainly I haven't objected when counsel led a witness because I know we are not being damaged by that in [368] any respect. However, I do call the Court's attention, and counsel's also that in our presentation of our case, objections were made on these matters and a good deal of evidence was excluded. I couldn't go along with counsel's suggestion that I sit back and permit evidence to go in that I think is clearly inadmissible, even in a preliminary way.

Court: I will reserve ruling on the objection; you may proceed with the evidence.

Q. Mr. Smith, in what capacity did you serve that gave you a knowledge with reference to shortages in pipe and cement and that sort of thing necessary in drilling of wells during the war period?

A. I was responsible for trying to get pipe and well casing and equipment and that sort of thing for our operations, and it was difficult to get pipe unless you could show an urgent need for the production of gas or for the production of oil. Now, in

(Testimony of Cecil W. Smith.)

this particular area, there was no market for oil, and it was difficult to persuade any major oil company to come up and drill in an area, and use steel for drilling wild cat wells in an area where there was no market for oil. With the scarcity of steel, they wanted to use it in fields where they had production and marketing facilities available.

Q. Was there any drilling for oil or deep tests in the Cedar Creek Anticline during the period from 1942 to 1948?

A. No, there was not. [369]

Q. Prior to 1948, I will say immediately prior, did you carry on any negotiations with the J. E. Manning Company looking toward the resumption of deep drilling in Cedar Creek?

A. Yes, we did.

Q. About when was that?

A. They were beginning in, I think, the latter part of 1947, extending over a considerable period of time, one or two years.

Q. Who was J. E. Manning?

A. J. E. Manning was a gentleman from Cody who was a drilling contractor, and who conducted negotiations with several different people whom he thought might be interested in drilling a well on the Cedar Creek Anticline.

Q. Developing out of those negotiations, did you have negotiations which led to a contract and the drilling of a well by Husky Oil Company of Cody, Wyoming?

A. Yes, we did.

Q. And when was that contract—strike that out.

(Testimony of Cecil W. Smith.)

When were your negotiations commenced, as well as you can remember?

A. I believe they were commenced in 1948, and the contract was executed, I believe, in the early part of 1949. I would have to refer to the contract itself for the exact date.

Q. Would your file in connection with that Husky well help you refresh your memory as to some of these dates I am inquiring about? [370]

A. I think it would.

Court: Pardon me, just a minute. Judge Erickson, while I think of it, with reference to these objections and so forth, I recall I excluded some of your evidence in your case. I believe that at the time I suggested you brief that, and if I find my position is wrong, I would reopen the case.

Mr. Erickson: I hope the Court didn't misunderstand me. I wasn't suggesting that the Court was not treating me fairly at all.

Court: I want to be sure you understand me. At the time it appeared it wasn't admissible at all. If you will brief the matter and show me, I will reopen the matter for you.

Mr. Erickson: I wasn't referring to anything else.

Q. Mr. Smith, I would ask you to refer to a communication of September 27, 1948, and another of October 13, 1948, and see if they will refresh your memory as to when your negotiations with Husky began?

(Testimony of Cecil W. Smith.)

A. There is a letter dated September 17, 1948—

Q. I am merely asking you to refer to it and then tell me when your negotiations with Husky began, as near as you can approximate?

A. They began about that time, about September, 1948.

Q. Did they subsequently lead to an agreement?

A. They did.

Q. And what was the date of your agreement with Husky? [371]

A. November 20, 1948.

Q. And as a result of that agreement, was a well drilled in the Little Beaver area?

A. Yes, it was.

Q. And where?

A. It was drilled in Section 7, Township 4 North, Range 62 East in Unit 8-B.

Q. And what were the results of the drilling of that well?

A. That well encountered oil and water in much the same manner as the Smith well encountered like production and like water, the Smith well being the third well drilled by our company.

Q. When was the well commenced?

A. May 13, 1949.

Q. And when was it completed?

A. The rig was moved off of that well on July 29, 1949. Tubing was installed and pumping equipment was installed, and it was pumped for some little time after that.

Q. Was there any production from that well?

(Testimony of Cecil W. Smith.)

A. There was a small amount of production. They had installed tanks and had pumped a quantity of oil there in order to test the well.

Q. What have you to say as to whether or not it was a commercial or non-commercial well?

A. It was not a commercial well. [372]

Q. And in connection with the drilling of that well, did you receive statements of the costs of the well from Husky? A. Yes.

Q. And were those furnished to you at the time the well was being drilled for your approval and information? A. Yes.

Q. Do you have those? A. Yes.

Mr. Lamey: I would say to the counsel and Court, we can produce those, or we have them tabulated and he can give the tabulated amount.

Mr. Erickson: I would like to see them.

Q. Now, Mr. Smith, what was the total cost of that Husky well? A. \$165,964.32.

Q. Now, following the completion of that well by Husky, did they do any further development in that Cedar Creek Anticline?

A. No, they did not.

Q. When did you begin negotiations with the Shell Oil Company which led to the agreement which has been introduced in evidence here as Exhibit No. 5?

A. I believe it was about July or August, 1950.

Q. Have you and your company at all times cooperated with Shell, Husky and Carter in their operations that you have described? [373] A. Yes.

(Testimony of Cecil W. Smith.)

Q. You know Mr. Smith and Haney; of course, who testified here as witnesses earlier in the case?

A. I do.

Q. Did you have occasion to visit with them and have some business transactions in California in the month of May, 1952?

A. I did.

Q. Where did your meeting or meetings take place?

A. I had two meetings at which Mr. Haney was present. Those both occurred at his home in La-Habre near Whittier, California. At those meetings, Mr. H. C. Smith was also present.

Q. And what have you to say as to whether or not Mr. Armin Johnson was present?

A. Mr. Armin Johnson was present at both of them.

Q. Was he acting as your attorney at that time?

A. He was.

Q. Was there any other meeting held with Mr. Smith while you were in California on this same occasion?

A. Yes.

Q. When and where was that held.

A. There was an additional meeting held in the office of Mr. Smith's attorney in Los Angeles. Mr. Johnson was present at that meeting.

Q. I take it Mr. Haney was not present?

A. I don't believe Mr. Haney was present at that meeting. [374]

Q. Now, what was the purpose of the meeting, or the meetings, rather?

A. Well, the meeting was for two purposes. Mr.

(Testimony of Cecil W. Smith.)

Haney had telephoned to me sometime previously and asked about the agreements for deep drilling on acreage that he had an interest in, and I had sent to him a copy of the Fidelity Gas Company agreement.

Q. About when was that?

A. Oh, I think that was sometime during April in 1952.

Q. And in the course of your meetings in California, particularly the two in Mr. Haney's home, was any discussion had with reference to the Fidelity operating agreement, Exhibit 2?

A. Yes, that was discussed, and the method of operation under that agreement was discussed, the interest that they held under that agreement was discussed with them.

Q. Did you also at that time discuss the purchase of certain gas rights in their land?

A. Yes, we discussed with them the purchase of their remaining gas and their interest in the wells in Unit No. 5.

Q. And those discussions and the subsequent conference at the lawyer's office led to those purchase agreements that have been introduced in evidence here?

A. They did.

Q. Now, at that time, did you discuss with them the progress of the Shell development that was then going on in the Cedar [375] Creek Anticline?

A. Yes, we discussed that quite fully. I had a map of the anticline and a map showing their interests, and I had a copy of the Shell operating

(Testimony of Cecil W. Smith.)

agreement, all of which we went over with them quite thoroughly and discussed with them in the two meetings.

Q. Did you at any time during these meetings or any other time advise Mr. H. C. Smith that M.D.U. and Fidelity had no interest in the deep horizons in these lands in which they were interested in Unit 5? A. I certainly did not.

Court: Pardon me, counsel, I think we will take a short recess until 10 minutes after four.

(10-minute recess.)

Mr. Lamey: May it please the Court, during the recess, counsel has asked us to produce the agreements to which reference has been made on the Carter and Husky wells, and we have done that, and I believe counsel indicated he would like to have them put in the record. We have no objection.

Mr. Erickson: In offering them, we have in mind our continuing objection, but as long as reference has been made to them, I would like to have them in.

Court: I think that is proper. I would like to have them in so—you see, I am going to have to finally decide whether any of these agreements they have had with Husky or [376] Carter or anyone else constitutes proceeding under their agreement with the Cedar Creek. That is one of the main questions we have to decide.

Mr. Erickson: That is our thought of what the case will come down to.

Mr. Lamey: I think, then, counsel, perhaps I can just dictate a stipulation that we now offer

(Testimony of Cecil W. Smith.)

under stipulation Exhibit 43, being a contract dated June 6, 1940, between Fidelity Gas and Carter Oil Company, and Exhibit 44, being an agreement between the same companies, dated November 27, 1940; Exhibit 45, which consists of a telegram from Carter Oil Company to Fidelity Gas Company, dated December 31, 1941, and a letter between the same companies dated December 30, 1941, which has to do with the terms of the agreement.

Mr. Erickson: That is agreeable to the plaintiffs.

Court: Very well.

(Defendants' Exhibits 43, 44 and 45 admitted in evidence.)

Mr. Lamey: May it also be stipulated that there be received in evidence Defendants' Exhibit 46, which is an agreement dated November 20, 1948, between Fidelity Gas Company and Montana-Dakota Utilities Company and Husky Refining Company; also a letter agreement which has been marked Exhibit 47, dated November 13, 1948, between these—yes, dated November 13, 1948, between these companies, and Exhibit 48, a letter agreement between the same companies dated May 22, 1950? [377]

Mr. Erickson: That is agreeable to the plaintiffs.

Court: Very well.

(Defendants' Exhibits 46, 47 and 48 admitted in evidence.)

Q. Mr. Smith, how long have you known John Wight, who testified for the plaintiffs here?

A. I believe since about 1927.

(Testimony of Cecil W. Smith.)

Q. Mr. Wight testified that sometime in 1937, or possibly 1938, at Minneapolis, Minnesota, he talked to you with reference to the Warren well particularly, and at this time and place, according to his testimony, you stated to him that your companies were all through with oil operations in the Cedar Creek Anticline, and particularly Unit 5, and I will ask you now whether or not you ever made a statement to that effect to Mr. Wight at the times indicated or any other time, a statement to that effect? A. I certainly did not.

Q. Has Mr. Wight ever discussed with you the deepening of the Warren well? A. He has not.

Q. What was the situation during 1937 and 1938 between your company and Mr. Wight, with particular reference to litigation and suits that he then had pending against your company?

A. I believe that he had four suits pending against our company.

Q. Was one of those a proceeding in the Department of Interior [378] entitled "Capital Gas and others vs. Montana-Dakota Utilities Company?"

A. It was.

Q. And also during that period was there an action of Montana Eastern Pipe Line Company vs. Montana-Dakota Utilities Company in the United States District Court of Montana, the Billings Division, before Judge Pray? A. It was.

Q. Do you know when that particular case was tried?

(Testimony of Cecil W. Smith.)

A. I believe that was tried, I believe, in March, 1937.

Q. And as part of this litigation to which you refer, was there a case, Montana Eastern Pipe Line vs. Minnesota Northern Power Company, Montana-Dakota Utilities Company, and Gas Development Company in the United States District Court in Minnesota? A. There was.

Q. And was there also a case at this same time of the Montana Eastern Pipe Line Company, Capital Gas Corporation, John Wight and E. A. Wight vs. Montana-Dakota Utilities Company and the Gas Development Company in the United States District Court of Montana, Billings Division?

A. There was.

Q. Do you know about when that case before Judge Pray was decided?

A. It was decided in 1938; I am not sure of the month. [379]

Q. Now, during the period, those years, 1937 and 1938, when this litigation was pending, was John Wight visiting your office in Minneapolis?

A. I don't have any recollection of his having been in there at all during that period.

Q. What was the general feeling between you and Mr. Wight arising out of this litigation?

A. Well, it wasn't a very friendly feeling, I would say.

Q. How long have you known Mr. Jirik?

A. I have known Mr. Jirik since, I believe, early in 1929.

(Testimony of Cecil W. Smith.)

Q. It was about that time that you began purchasing gas from his company, the Cedar Creek Oil and Gas Company, was it not?

A. Yes, I think I met Mr. Jirik shortly before we worked these contracts out.

Q. Did you hear Mr. Jirik testify yesterday about conversations he had with you concerning the Warren well? A. I did.

Q. And also concerning statements that he said were made by you with reference to abandoning the operations for oil in the Cedar Creek Anticline?

A. I did.

Q. As I recall, Mr. Jirik fixed two dates, or approximate dates, on which he talked to you, in the fall of 1937, and shortly after January 1, 1938, and I will ask you whether at [380] that time, or at any other time, you ever told Mr. Jirik that your companies, the Fidelity and Montana-Dakota Utilities Company, or any other companies, were abandoning their oil rights in the Cedar Creek Anticline, or any part thereof? Did you ever make any such statement? A. I certainly did not.

Q. Did you at those times or any other time tell Mr. Jirik your companies were abandoning their deep horizon drilling program in Montana?

A. I never told him we were discontinuing our activities in connection with deep drilling. As a matter of fact, he came into the office——

Mr. Erickson: May I at this point move to strike the answer as being not responsive.

(Testimony of Cecil W. Smith.)

Mr. Lamey: Maybe from "As a matter of fact" on.

Mr. Erickson: No, right at the start.

Court: Read the question and answer, Mr. Parker.

(Question and answer read back by Reporter.)

Mr. Erickson: Withdraw the objection.

Mr. Lamey: You may strike from "As a matter of fact" on, and I will go on with another question.

Court: Very well.

Q. Did you, on or about the month of February, 1938, have any conversation in your office with Mr. George Seivers and Mr. Thomas Jirik pertaining to the Warren well? [381]

A. No, I did not.

Q. It was testified, as I recall, by Seivers and perhaps Mr. Jirik that at the time just mentioned that you made a statement to the effect that your companies were abandoning their oil program in Montana. Did you, at the time indicated, or at any other time, make such statements to George Seivers in the presence of Mr. Jirik, or to him alone?

A. I did not.

Q. Did you ever make such a statement to Mr. Jirik? A. I did not.

Q. Now, there was some reference made by Mr. Seivers, as I recall, in attempting to fix a date, that there was some occasion to speak about the drilling of wells in the Eagle sands. Now, do you recall whether you ever had a conversation with

(Testimony of Cecil W. Smith.)

Mr. Seivers, either with or without Mr. Jirik, where there was some discussions of the Eagle sand drilling in Unit 5?

A. Yes, I recall that I had a conversation with them in connection with that.

Q. When was that?

A. It was sometime subsequent to 1940.

Q. How do you fix that date?

A. We had drilled one well on the Cedar Creek acreage to the Eagle sand, and that well was completed in 1940, and Mr. Jirik and Mr. Seivers came [382] up to the office to discuss the possibility of having further wells drilled on their acreage to the Eagle sand.

Q. Now, what have you to say as to visits, or the frequency of visits by Mr. Jirik to your office during a period, we will say 1937, 1938, on to about the time this suit was commenced?

A. Mr. Jirik used to stop into the office frequently and discuss with me progress that was made in connection with the deep drilling of these wells. He was very much interested.

Q. Did he stop in and discuss with you from time to time the drilling of your first three wells, N. P. 1, Smith No. 1 and Warren?

A. I think he came in occasionally. I was out in the field considerably during the drilling of those first three wells, and he was out there several times during the drilling operations.

Q. What about his visits during the drilling of the Carter well?

(Testimony of Cecil W. Smith.)

A. He stopped in frequently while the Carter well was being drilled and wanted to know the progress, how they were coming along, and generally the results of the drilling.

Q. And did he make any visits during the drilling of the Husky well? A. Yes, he did.

Q. And did you discuss that well and its progress with him? [383]

A. Yes, that is correct.

Q. And were any visits made subsequently with reference to the development that Shell undertook and was carrying on under its contract?

A. I don't believe so.

Q. Mr. Smith, has the Fidelity Gas Company at any time in the past received from any of the plaintiffs or their predecessors in interest any written notice claiming a default in the performance of drilling, operating, or producing obligations under the Fidelity operating agreement?

A. It never has.

Q. Have any of the plaintiffs or John Wight or Mr. Jirik, individually, ever requested Fidelity Gas Company to give a release of the Fidelity operating agreement covering their respective lands?

A. No one has ever requested a release.

Mr. Lamey: You may cross examine—pardon me. You may cross examine.

(Testimony of Cecil W. Smith.)

Cross Examination

Q. (By Mr. Erickson): With reference to your testimony as to the officers of Fidelity, you said you thought Mr. Hayes was President of Fidelity. Is he President, or isn't he?

A. That is my recollection; I don't recall. [384]

Q. If he is the president, do you recall how long he has been president?

A. If he is president, he has been president since the beginning.

Q. Might it not be true that Mr. Heskett is President of Fidelity?

A. I couldn't tell you for certain.

Q. Now, prior to the time of the making of the unit agreement, which is Exhibit 3, did you purchase any gas from Mr. Wight or from the companies with which he was associated, having in mind Capital Gas and Montana Eastern?

A. I don't believe so.

Q. Now the gas that was purchased under the agreement of 1929, which is in evidence here, between you and Cedar Creek Oil and Gas Company, the price stated in that contract, as I recall, is three cents, is that your recollection of it also?

A. I am not sure, I would have to look at the contract.

Q. An examination of the contract indicates three and a half a thousand for the gas from shallow wells, and five cents from deep sand. Would that be your recollection of it also?

A. That is correct.

(Testimony of Cecil W. Smith.)

Q. Now, during all of the period in which you have purchased gas in the Cedar Creek area, do you know what price you have paid for gas purchased from the Federal Government? [385]

A. Royalties on Government gas are fixed at five cents.

Q. So that the amount that is charged as royalties in these statements on a unit operation reflect a five cent price, is that correct?

A. On the royalty gas.

Q. What price have you paid during all these years for the gas you purchased from Montana-Dakota Utilities Company?

A. We don't pay anything.

Q. I mean from the Northern Pacific Railway Company.

Mr. Lamey: Object to this as incompetent, irrelevant and immaterial, improper cross examination.

Court: What is the purpose?

Mr. Erickson: The witness has testified at some length about buying gas from these plaintiffs prior to the time of making the contract as part of the general over-all considerations, and it is to refute the suggestion in our testimony that there was pressure on these people to enter into an agreement, and the statement was made by this witness that all the purchase agreements were negotiated with all the people involved in this unit, and the purpose of this is to establish there was a different basis for making the purchase contract with the

(Testimony of Cecil W. Smith.)

Northern Pacific, one of the participants than with these plaintiffs.

Court: What would that prove?

Mr. Erickson: It would prove the general [386] conditions under which the contract was negotiated; and, in fact, the witness has testified they were all the same, and to show they were not the same, and, of course, it would tend to impeach the witness.

Court: If that is the purpose, you may proceed for that purpose.

Q. Is a different price paid the Northern Pacific in the same area in Unit 5 than is paid to these plaintiffs in the purchase of gas?

Mr. Lamey: When? Would you fix it?

Q. During all the time, right from the start.

A. The gas purchased from the Northern Pacific Railway is on a royalty basis; it isn't on a gas purchase basis. I believe that there was a well near Unit No. 5 that the Northern Pacific owned, and my recollection is that that gas was paid for at three cents.

Q. But your contract with the Northern Pacific is not the same as these insofar as the unit people are concerned, primarily because the Northern Pacific is the owner of the fee, is that what you are saying?

Mr. Lamey: We object on the grounds it is incompetent, irrelevant and immaterial, no proper foundation laid. The contract itself is the best evidence.

Q. Very well. Do you have the contract, Mr.

(Testimony of Cecil W. Smith.)

Smith, between Montana-Dakota Utilities and the [387] Northern Pacific Railway on any lands involved in Unit 5?

A. I think there are a few tracts belonging to the Northern Pacific in Unit No. 5.

Q. And do you have available any of those contracts covering the gas operations there?

A. I don't, but I would say this, that those are leases, those are not gas purchase contracts. We have no gas purchase contracts other than the one I mentioned with the Northern Pacific.

Mr. Erickson: I may say, counsel, that is the only purpose I had in asking the question. I wanted to explain what the situation was. It wasn't with the purpose of trying to prove any part of my case that I asked the question.

Q. You have mentioned that when the unit agreement was under negotiation and under discussion, the term for the companies represented by Mr. Wight was a definite term because of their efforts to build a pipe line to ship their gas, is that a correct statement of the situation, Mr. Smith?

A. I believe it is.

Q. Now, isn't it a fact, Mr. Smith, that it was during that period that Mr. Wight started this litigation of which you spoke, which had to do with securing a right for transportation over your lines, and that actually the concern was the completion of that litigation that dictated the five year term?

A. Well, I think that was partly it, and I believe that the records of the meeting show that he

(Testimony of Cecil W. Smith.)

stated that he wanted to build a pipe line and that was the reason he hadn't made any contract sooner.

Q. But, as to the five year contract, the primary consideration was the litigation pending, is that correct? A. I don't believe it was.

Q. Was that discussed?

A. I think it was discussed.

Q. You mentioned a record of the meeting. Were there formal minutes kept of the meeting to which reference has been made? A. Yes.

Q. Do you have those minutes? A. Yes.

Q. Do you have them here? A. Yes.

Q. I wonder if I might see them?

Mr. Lamey: May I inquire so I will have those before us, were those records kept by a U. S. G. S. man? Is that the record you are referring to?

Witness: Those were kept by a representative of the U. S. Geological Survey.

Q. I hand you, Mr. Smith, a document consisting of several sheets, entitled "Memorandum of Conference Re Unit Operation," and ask you if those are the records of which you spoke insofar [389] as the meeting is concerned?

A. That is correct.

Q. And that record, as you have indicated, was prepared by a representative of the Secretary of the Interior, Mr. Duncan, is that true?

A. That is correct.

Q. Do you know whether that is the only copy of that memorandum that you have?

A. No, there were other copies of this, and they

(Testimony of Cecil W. Smith.)

were transmitted to the various parties who attended the meeting.

Q. I am asking just for convenience here whether you have another one because I would like to have this put into the record.

A. I don't believe I have; we may have it somewhere.

Mr. Erickson: The memorandum having been marked Plaintiffs' Exhibit 49, and having been identified by the witness as the record of the meeting as kept by the representative of U. S. G. S., the plaintiffs offer Exhibit 49.

Mr. Lamey: No objection.

Court: It is admitted.

(Plaintiffs' Exhibit 49 admitted in evidence.)

Q. Now, calling your attention to the report in the memorandum of the conference, the paragraph numbered 2, I will ask you to read that, and then with your memory refreshed by reading that, state whether or not the discussion insofar as [390] Mr. Wight was concerned on the five year term was restricted to a discussion of the pending litigation?

A. That is the substance of the minutes. Of course, the minutes did not include the whole discussion, and the discussion covered a wide range, and whether this was the entire reason for the five year term, or whether a pipe line was to be constructed——

Q. But insofar as the minutes show——

(Testimony of Cecil W. Smith.)

A. Insofar as the minutes show, that is what Mr. Duncan put down.

Q. With reference to the meeting of May 2, 3 and 4 of 1934, concerning the unit agreement, the gas purchase agreement and the operating agreement, were there any other conferences, either before or after, with Mr. Wight concerning these matters?

A. I don't recall any other conferences with respect to that. There may have been discussions from time to time with Mr. Wight. This was the only conference that I remember where all parties met with U. S. Geological Survey representatives to finally work out a program.

Q. Had there been conferences, formal or informal, between you and Mr. Wight prior to this formal meeting of May, 1934?

A. I am not clear in my memory, but I think there had been.

Q. Can you say whether they were or were not held in Billings? [391]

A. No, they were not held in Billings.

Q. At the conference in Billings there were under discussion three instruments, according to these minutes, the Unit No. 5 agreement, which is Exhibit 3; the gas purchase agreement, which is Exhibit 4; and the operating agreement, which is Exhibit 5, is that your recollection of the matter?

A. That is correct.

Q. Now, as to the agreement concerning the operation of Unit No. 5, was there an agreement

(Testimony of Cecil W. Smith.)

in draft form at the time you started the conference? A. Yes.

Q. And who had prepared that, do you know?

A. My recollection is that agreement had been prepared and had been submitted to the U. S. Geological Survey several times for their ideas on what the agreement should be. You understand, when this agreement was made, it was one of the first unit agreements that was worked out by the U. S. Geological Survey. Sometime afterward, they got out a standard form of agreement.

Q. But the original drafting work was done by Montana-Dakota Utilities Company, was it not?

A. It was done by Montana-Dakota Utilities Company, and the basis for that was a unit agreement that the U. S. Geological Survey had worked out with Carter Oil Company covering the Billy Creek field. [392]

Q. Insofar as Unit 5 was concerned, was any part of the drafting of the agreement or any part of it done by the plaintiffs or these other folks?

A. Yes, the agreement was brought out at the meeting, and it was gone over word by word, and suggestions were made by Mr. Wight, Mr. Norbeck and Mr. Huntington, and the agreement was finally agreed upon by all the parties.

Q. Was the agreement as to Unit No. 5, which now appears in printed form in printed form at the inception of the conference of May, 1934?

A. No, it was not.

(Testimony of Cecil W. Smith.)

Q. The printing occurred thereafter, is that correct?
A. That is correct.

Q. Now, with reference to the changes that were made by any request of the plaintiffs or their predecessors, can you indicate generally what changes were made in the contract?

A. I can't offhand, but I think they are outlined rather completely in the minutes of that meeting.

Q. With reference to the minutes as to the plan of operation of Unit 5, from your reading, you will recall that reference was made to certain litigation then pending?
A. That is correct.

Q. So that as early as 1934, there was litigation pending between your people and Mr. Wight's people, is that correct?
A. That is correct. [393]

Q. And isn't it a fact that since about 1930, or perhaps even before that date, there has always been litigation pending between Mr. Wight's group and your group?

A. No, that is not correct. I don't think the litigation started until 1933 or 1934.

Q. Well, starting with 1933 and 1934, and through this period in 1938, there was litigation pending, was there not, at all times, between Mr. Wight's interests and yours?

A. No—you mean through 1938?

Q. Yes.
A. That is correct.

Q. So, that the fact there was litigation pending during 1937 and 1938 was not an unusual situation, is that correct, up to that time?

(Testimony of Cecil W. Smith.)

A. Well, it was unusual in that we had worked out this arrangement and attempted to dispose of the litigation, and it was not disposed of.

Q. But there was litigation pending at the time you made this agreement and went through the preliminaries in 1935, is that correct?

A. That is correct.

Q. That didn't prevent you and Mr. Wight from discussing business matters, did it?

A. It didn't up until the time the agreement was worked out.

Q. After the time of the signing of the unit [394] agreement in 1935, is it your testimony you had no further conferences with Mr. Wight through the years 1935, 1936 and 1937, concerning business affairs?

A. That is correct.

Q. You recall no meetings with Mr. Wight from the signing of the unit agreement on through 1938?

A. No, I do not.

Q. As to the gas purchase agreement, the minutes would indicate that there was little discussion, is that your recollection of it?

A. I believe the only discussion we had with respect to the gas purchase agreement, there were some changes made in it as requested, but I think the only discussion of any consequence was the term of the agreement.

Q. With reference to the operating agreement, Exhibit 5, the minutes indicate there was not very much discussion, is that your recollection of it?

A. In my recollection of that, that is correct.

(Testimony of Cecil W. Smith.)

The operating agreement was read, gone over paragraph by paragraph, and there were very few comments made with respect to the deep test operating agreement, because everyone at that time was very anxious to get the acreage in the area consolidated so that drilling could be carried on.

Q. Do you know who prepared the operating agreement?

A. I think we prepared the operating [395] agreement. I believe there was discussions of the form of the operating agreement over several months with a large number of parties who were involved.

Q. Do you recall whether the operating agreement was in a printed form at the inception of the conference at Billings? A. I believe it was.

Mr. Erickson: May it please the Court, in view of the rather extensive cross examination that will be necessary, I think we might save the Court's time if we had a recess now until tomorrow morning so we could prepare our examination a little better.

Court: Very well, Court will stand in recess until ten o'clock.

Mr. Erickson: I am sorry, your Honor, but there are some of these exhibits we have not had a chance to examine that we would like to examine the witness on on cross examination. We would like leave to take out of the files for overnight the instruments that have to do with the Carter drill-

(Testimony of Cecil W. Smith.)

ing, the Husky drilling, and the minutes that we have just referred to.

Court: You will keep them in your possession, Judge, and be responsible for them. That is agreeable. Court will stand in recess until 10 o'clock tomorrow morning.

(Whereupon, a recess was taken until 10:00 a.m., the following day, April 16, 1955, at which time the following proceedings were had:)

Q. Mr. Smith, you testified that all of the lands in the area delineated by the lines around Unit 5 came into the unit, is that correct?

A. I believe that eventually there was one piece of Government land that came in under a compensatory royalty agreement.

Q. It wasn't in as one of the regular signers of the unit agreement, is that correct?

A. Correct.

Q. As of the year 1936, there was still considerable acreage that was not in Unit 5, is that true or not?

A. I don't recall.

Q. At any rate, they didn't all sign up at the same time on the unit plan?

A. That is correct, it extended over a period of a year or so.

Q. Yesterday Mr. Lamey asked you about the Eagle sands, and he asked you if it was unitized, and your reply was first that it was, then later you said it was not in a participating area. Now, what do you mean by that?

A. I meant that the agreement for unit opera-

(Testimony of Cecil W. Smith.)

tion provided for the further unitization of other gas or oil horizons, and that there had not yet been a definite plan put into effect for the Eagle sands.

Q. So that actually your answer to Mr. Lamey should have been that it is not unitized, is that correct? [397]

A. No, that isn't correct. It is unitized under the original agreement, but the definite plan for that horizon has not yet been approved by the Secretary.

Q. Isn't it a fact, Mr. Smith, that for a number of years you have been negotiating with Cedar Creek Oil and Gas and others seeking to get them to join you in the unit plan for the Eagle sands?

A. In accordance with the terms——

Q. Now, I am asking you, haven't you carried on negotiations with them?

A. Carried on negotiations for the establishment of the unitized area in the Eagle sands.

Q. Is there any unitization of the Eagle sands at all at present?

A. There is not, except as to the agreement that they will be unitized.

Q. Just answer my question. Is it unitized?

A. The participating area has not yet been determined.

Q. Mr. Smith, you know what participating area is, do you not?

A. Correct.

Q. For example, in 8 or 8-A, you have it unitized, but there is only part of the land surface

(Testimony of Cecil W. Smith.)

that is included in the participating area, is that correct? A. Correct. [398]

Q. Participating area doesn't have anything to do with which sand it is, does it?

A. It has to do with each sand operated.

Q. You have unitized the Judith River sands, have you not? A. Correct.

Q. And the unit agreement, Exhibit 3, specifically relates to the Judith River sands, does it not?

A. The unit agreement, in paragraph 3, provides as follows: "It is agreed, however, that this co-operative or unit plan is limited and shall apply only to operations or development, production and marketing of natural gas from the geologic formation constituting the Judith River sand in said Unit No. 5, deposits of gas from other sands, and deposits of oil from any and all sands being expressly excluded from the force and effect of this agreement; except that the parties hereto hereby consent and approve and authorize the operator to include all their interests in any similar unit plan of development and operation which may be approved by the Secretary of Interior, which may cover the development, production and marketing of natural gas from any other sands, or deposits of oil from any and all sands. In case a majority of the parties hereto cannot agree upon the details of any such similar unit plan of development, it is hereby agreed that the decision of the Secretary upon such disputed details shall be final and binding upon the parties hereto." [399]

(Testimony of Cecil W. Smith.)

Q. All right. Until there is action taken under that last paragraph, and there is unitization of the Eagle sands, can there be, or can they be a part of any participating area in any unit?

A. It can as soon as the Secretary determines the disputed details.

Q. Details of what?

A. Details of the plan that is submitted.

Q. It is a unit plan, is it?

A. It is further unitization under this clause.

Q. It is a unit plan similar in structure to the one in existence on Unit 5, is that correct?

A. Correct. We have authority to include the lands in any similar plan.

Q. Has the Eagle sand ever been included in any similar plan?

A. It has not because we have never received the disputed details to work out.

Q. Have you ever had the consent of Cedar Creek Oil and Gas to include it in the unit agreement?

A. Yes.

Q. Do you have it with you?

A. It is in the operating agreement.

Q. You have had extensive negotiations with Cedar Creek Oil and Gas seeking an agreement from them to join in a unit plan for the Eagle sands? [400]

A. No, we have not. We sent the proposed plan out to all parties with the request if there was any objection to it, we would like to receive it. We have never received those objections from Cedar

(Testimony of Cecil W. Smith.)

Creek or any of the others. I understand there were objections that were filed with the Secretary of Interior.

Q. Have you not, as a matter of fact, received a letter signed either by George Seivers or Mr. Jirik reporting their Board of Directors had refused to okay the unitization of the Eagle sands?

A. I may have received such a letter, but didn't receive any statement from them as to what the disputed features of the plan were.

Q. But they did turn down the plan.

A. I don't think they turned down the plan. They said they had refused to accept the plan, but they didn't follow the procedure outlined in the agreement. The agreement was returned to us by the U. S. Geological Survey for some revision that they suggested. That is the present status of the negotiations.

Q. You also negotiated with H. C. Smith and W. B. Haney about putting their lands in the unit plan?

A. We sent them copies of the plan at the same time as Cedar Creek and all other parties.

Q. As a matter of fact, H. C. Smith turned it down, did he not? [401]

A. I don't recall.

Q. The unit plan for the Eagle sands was submitted to the Secretary of Interior, was it not?

A. It was submitted to the supervisor of the Geological Survey, and I understand it was forwarded to Washington.

(Testimony of Cecil W. Smith.)

Q. Do you know what, if any, action was taken on it?

A. It was returned to us with a request for modification in the proposed participating area.

Q. As a matter of fact, the proposed unitization of the Eagle sands was suggested as early as 1938, was it not?

A. I don't recall.

Q. If I were to tell you the records would show there was a proposal for unitization as early as 1938, and it was turned down by the Secretary, would you be able to say whether I was right or not?

A. I would have to see the correspondence to determine just what did take place.

Q. As to the Eagle sands, the operations as of now are that the gas is purchased by the Montana-Dakota Utilities Company, is that correct?

A. That is correct.

Q. Under a gas purchase contract?

A. That is correct.

Q. Insofar as the various wells are concerned, [402] there is no pro-rating the income over non-productive and productive lands as there is in the unit plan, is there?

A. No, there is not at the present time. That was the purpose of proposing to set up a participating area for that sand.

Q. Income is not distributed in accordance with the provisions of the Fidelity gas agreement, is it?

A. I don't recall what provision there is in the

(Testimony of Cecil W. Smith.)

Fidelity gas agreement for the distribution of income.

Q. The provision of that agreement calls for a 75-25 split after payment of all expenses. The gas isn't paid for from the Eagle sands under any such arrangement, is it?

A. The Fidelity gas agreement has nothing to do with the Eagle sands. That exempts everything above 2,000 feet.

Q. When you took over Unit 5, who owned the gas wells? I think you said as you recall, there were from 12 to 14 wells in total on the unit when you took over its operation.

A. I believe that Cedar Creek owned two or three wells, I am not sure, and I believe that John Wight's group had some four or five or six wells. I am not familiar offhand with the ownership at that time, it is a long time ago.

Q. And how many did Montana-Dakota Utilities own, do you remember, or Gas Development?

A. I think there was only one or two.

Q. As of today, how many wells are there in Unit 5? [403]

A. I couldn't tell you offhand.

Q. If I were to tell you there were 17, would that square with your recollection?

A. Oh, I would say there was probably 17 or 20, somewhere along there.

Q. You wouldn't think it would be more than 20?

(Testimony of Cecil W. Smith.)

A. Well, it might be; I haven't kept track of individual wells.

Q. Would the Exhibit 1-A show the number of wells?

A. I didn't prepare Exhibit 1-A, so I couldn't say whether it shows all the wells or not.

Q. I don't believe it bears a date, either, does it? Yes, 1934.

A. That is the old date.

Mr. Lamey: So there won't be any question about the record, I think you are referring to a date of the U. S. Geological Survey print, are you not?

Mr. Erickson: Probably.

Mr. Lamey: The map actually was prepared shortly before the pretrial conference in Butte as to wells.

Q. Do you know who prepared this map, Mr. Smith?

A. No, I don't.

Q. You don't know who put the legends on?

A. No.

Q. Do you know whether it was done by [404] somebody in the office of Montana-Dakota Utilities Company?

A. I don't know.

Mr. Lamey: Counsel, I think I can help you. It was prepared in the Geological Department of the Shell Oil Company.

Mr. Erickson: Is it agreeable that we may refer to that map for the number of wells in the unit as of now?

Mr. Lamey: I don't know if they were all on there.

(Testimony of Cecil W. Smith.)

Mr. Johnson: I am not sure that map was prepared with the objective of showing the particular number of Judith River wells, but I think we could get that information for you.

Mr. Erickson: I would appreciate it, and it would shorten the examination.

Q. There was some discussion yesterday about the taking of extra gas to make up for compensatory royalties that were paid. Do you recall that testimony? A. I do.

Q. What land was being produced that resulted in the drainage that required payment of compensatory royalties, do you know?

A. I am not sure.

Q. It would have to be fee lands, would it not?

A. It would have to be fee lands.

Q. Isn't it a fact, as reflected by these minutes, that this agreement on the part of Montana-Dakota [405] Utilities to buy extra gas in Unit 5 to make up for compensatory royalties applied to purchases from everyone, did it not?

A. I don't get your question.

Q. In your testimony yesterday, you indicated that you bought extra gas from these plaintiffs before the Federal Government would approve of the unit agreement to take care of this additional amount that had to be paid for compensatory royalties. You made the same purchases from everybody in the unit, didn't you? A. No, we did not.

Q. Who didn't you make purchases from?

A. We only made purchases from wells located

(Testimony of Cecil W. Smith.)

on lands Mr. Wight and his group owned and where the U. S. Geological Survey had claimed there was drainage.

Q. Was there any other land in the unit that you recall where U. S. G. S. claimed there was drainage? A. I believe not.

Q. Yesterday you said that the boundary of Unit 5 north and south was determined by negotiation between the parties, but as to the east and west, that was determined by the U. S. Geological Survey people, is that correct.

A. No, I think I said the boundaries north and south were determined more or less by the land ownership, and that the ones on the east and west were determined by agreement with the U. S. Geological Survey. [406]

Q. It is a fact, is it not, that as to the east boundary, it originally included lands over in 60, and that by reason of the objection of Wight and Norbeck, and with your consent, the boundary was pulled in on the east, do you recall that.

A. Yes, I recall that, and that subsequently the unit agreement was modified by a supplement which included those lands in 60.

Q. But, at the time of the negotiation, that east boundary was fixed originally because of the discussion between the parties, isn't that correct?

A. That is correct. The discussion between the parties also involved the U. S. Geological Survey, I believe, as the record shows.

Q. Did you testify yesterday there weren't any

(Testimony of Cecil W. Smith.)

preliminary meetings between you and John Wight prior to the meeting of May, 1934?

A. I don't believe I did. I think I said there may have been some preliminary discussions, but the meeting at Billings was the one which finally determined the features of the agreement.

Q. You made a trip to Faribault, Minnesota, to discuss these various agreements, you indicated yesterday. Was there more than one of these trips?

A. There was only one to Faribault.

Q. Were there other meetings with the Cedar [407] Creek people concerning the making of the three contracts?

A. We had discussions with Mr. Jirik quite frequently before that in connection with the working out of the deep test and the unit agreement.

Q. Would those discussions have taken place in your office in Minneapolis?

A. I think they did.

Q. Were the contracts, particularly the Fidelity operating agreement signed at the time of your trip to Faribault?

A. I am not sure, I don't believe they were.

Q. If I were to tell you that both the operating agreement and the unit agreement with Cedar Creek were signed on the same day, the 7th of February of 1935, would that serve to refresh your recollection as to whether they were signed at the time you made the trip to Faribault?

A. No, it would not.

Q. Under what circumstances were the agree-

(Testimony of Cecil W. Smith.)

ments, the Fidelity operating agreement and the unit agreement, given to Mr. Jirik of the Cedar Creek Company, do you recall that?

A. I believe that the agreements had been furnished to him sometime prior to that and that he had gone over them and he had a number of questions from time to time that occurred to him as he read them, and we had discussed the various things in connection with both of the agreements from time to time, and he had wanted to know just [408] how it was going to affect his income, and the sale of gas, and a number of questions of that kind that were discussed, I would imagine, over a period of four or five months before they were executed.

Q. Do you know whether Cedar Creek drafted any part of the agreement.

A. No, they did not draft any part of the agreement, because the agreements had been worked out with Mr. Wight and his associates and the U. S. G. S. sometime prior to that.

Q. Mr. Jirik testified that at the discussions concerning the making of the Unit 5 agreement, you had told him that unless they signed the unit agreement, you would purchase no more gas from them. Did you hear that testimony? A. I did.

Q. What have you to say as to its accuracy?

A. I would say it was inaccurate because no such statement was ever made.

Q. Mr. Wight made substantially the same state-

(Testimony of Cecil W. Smith.)

ment, as you heard. What have you to say as to the accuracy of it?

A. I don't recall what Mr. Wight's statement was; I don't recall that he made such a similar statement.

Q. Well, I believe Mr. Wight made the statement, but if he did make the statement, can you say whether it would be true or not?

Mr. Lamey: May it please the Court, this is argumentative, and assuming a state of facts not shown to exist. [409]

Court: Sustained.

Mr. Erickson: I believe he said it.

Court: It is not up to the witness to decide whether or not what he said was true, it is one of the problems I have to decide.

Mr. Erickson: I was trying to avoid the necessity of going back into the record.

Court: You can ask him if he made any such statement.

Mr. Erickson: Thank you, your Honor, the solution was so simple, it escaped me.

Q. Did you ever say to John Wight in the course of negotiations for the unit agreement that unless he and his group signed the unit agreement, you would not purchase gas from him and his group?

A. I don't think any such statement was ever made.

Q. Are you quite sure about it? A. Yes.

Q. Now, if you made no such statement, and if

(Testimony of Cecil W. Smith.)

the Wight's group or the Seivers' group didn't join the unit plan, how could you purchase gas from them on their sands within the unit area?

A. We already had contracts with the Cedar Creek Gas and Oil Company to purchase gas from any and all sands on any of their acreage. That was made in 1929 long before the negotiations on the unit were commenced. Of course, as far as [410] Mr. Wight and his associates were concerned, we had endeavored to buy gas from them over a period of years, but had been unsuccessful.

Q. So, you would be free to purchase gas from non-members of the unit agreement out of the unit area, is that correct?

A. Well, the leases or the agreements with respect to the purchase of gas would have had to be made subject to the unit agreement if it had been made prior to that.

Q. So, in other words, you are now saying that you could not buy gas from lands in the unit area that were not committed to the unit agreement without something in the purchase agreement making the lands subject to the unit agreement, is that correct?

A. No, not necessarily. All that we would have had to have done would be to protect the unit lands against drainage under those circumstances.

Q. My understanding of your testimony yesterday was that your arrangements with Northern Pacific as to gas are somewhat different than they are with the plaintiffs, is that correct?

(Testimony of Cecil W. Smith.)

A. Correct.

Q. Do I understand you hold leases on the Northern Pacific lands? A. That is correct.

Q. And the payments for gas are made in the form of royalty payments rather than under a gas purchase contract? [411]

A. That is correct, they are not comparable.

Q. In your testimony, the 90 per cent of the area on the Cedar Creek Anticline was committed to the unit agreements, by that you didn't mean 90 per cent of the total area was represented by owners who signed the unit agreement, is that correct?

Mr. Lamey: Read that question again.

(Question read back by Reporter.)

Mr. Lamey: It seems to me it is the same thing. I don't know just what you are asking.

Q. I wanted to be sure as to the extent of the coverage of the unit agreement of this area. You said 90 per cent?

A. You are talking about——

Q. The whole area.

A. You are talking about the unitized Judith River sand?

Q. Yes.

A. Yes, I would say 90 per cent of the entire producing area of the Judith River is covered by unit agreements.

Q. At the outset, Unit 8, which has now been made into two units, was an oil unit, was it not?

A. That is correct.

Q. So, your statement would be modified to the

(Testimony of Cecil W. Smith.)

extent that the area in 8 and 8-A is involved, is that true?

A. 8-A and B are unitized as to the shallow sands.

Q. How long ago did that occur? [412]

A. I think it was approved in 1942.

Q. It is a fact, is it not, that as to Unit 8 and 8-A, considerably less than 90 per cent of the area is covered by the Fidelity agreement as of now, is that true?

A. Read that question?

(Question read back by Reporter.)

A. No.

Q. Since the making of the Fidelity agreement down in Unit 8 and 8-A, a considerable amount of acreage that was once committed to the Fidelity agreement is no longer committed to the Fidelity agreement, is that correct?

A. No.

Q. Have you dropped any Fidelity agreements in Units 8 and 8-A?

A. We have not dropped any Fidelity agreements. At the time Units 8-A and 8-B were formed, the boundaries of what had formerly been Unit 8 were reduced, made smaller.

Q. And as a result, were some of the Fidelity agreements relinquished or cancelled or terminated?

A. Some acreage that was included under Fidelity agreements was dropped.

Q. I call your attention now to Defendants' Exhibit 46, which is your contract with the Husky Refining Company, and particularly to page 11, and I see opposite the paragraph 13 certain ini-

(Testimony of Cecil W. Smith.)

tials, and one of them apparently is yours, is that correct, "C. W. S."? [413]

A. That is correct.

Q. In that paragraph, it is recited that certain tracts are not covered by Fidelity agreements and that certain tracts may have been covered and are no longer covered, is that true?

A. That is correct.

Q. Acreage involved is considerable, is it not?

A. I think there was quite a substantial acreage dropped at that time. However, that was dropped from Fidelity agreements. Fidelity agreements are still effective as to the remaining acreage that is within the boundaries of Units 8-A and 8-B.

Q. As to the area down in 8-A and 8-B, when did gas production start there?

A. In 8-A and 8-B, I believe about 1941 or 1942.

Q. How were the rentals being paid on the lands down there prior to the time gas production started?

A. The rentals down there, I believe, were being advanced by Montana-Dakota.

Q. And under what sort of arrangement, do you know?

A. Under an arrangement with the owners of the lands.

Q. And were payments made pursuant to the provisions of the Fidelity operating agreement?

A. I believe they were made pursuant to both a Fidelity operating agreement and a temporary

(Testimony of Cecil W. Smith.)

[414] gas purchase agreement which we had with the owners of the lands down there.

Q. I am talking about the period before there was gas production?

A. We had had a temporary gas purchase agreement from some of the owners down there, although there was very little gas produced under that agreement.

Q. As to these lands that were dropped, were they lands on which Fidelity Gas or Montana-Dakota Utilities was paying federal rentals prior to the time they were dropped?

A. I don't recall, I think some of them were.

Q. Can you recall the date on which these various tracts were dropped, as referred to in the exhibit?

A. As I recall, it was somewhere around 1940, 1941 or 1942.

Q. Now, it is a fact, is it not, Mr. Smith, that prior to 1941, Fidelity Gas, or Montana-Dakota Utilities, on its behalf, was paying the federal rentals on substantial acreage in the Cedar Creek Anticline that was covered by the Fidelity operating agreements, is that correct?

A. I believe they were paying rentals where gas production was not sufficient to take care of the rents out of production from shallow gas.

Q. After the abandonment of the Warren well, was that practice of paying the rentals, the royalties on federally owned land continued where there was not sufficient production to pay the rentals?

(Testimony of Cecil W. Smith.)

A. What lands are you talking about?

Q. Federal lands which were included, originally covered by the Fidelity operating agreement.

A. Are you referring to Unit 5?

Q. Any place up and down the structure first?

A. I believe that where royalties were not sufficient to pay rentals, that money was advanced by the Montana-Dakota Utilities Company.

Q. Did they continue to do that after 1938?

A. Yes.

Q. And to what extent?

A. I couldn't tell you what extent. That depended on gas production from time to time. It depended too on the provisions of the unit agreements as well as the Fidelity agreements.

Q. Were there cases where you signed Fidelity operating agreements where there were no unit agreements?

A. Yes.

Q. How extensive was that?

A. Well, I believe at the time of the Fidelity operating agreements, when they were obtained, there were no units organized south of Unit No. 5, and that the Fidelity agreements covered all of the acreage in that area, and the unit agreements were subsequently made covering that acreage.

Q. Can you say whether or not even as of today [416] you have lands described by the Fidelity operating agreement that are not in any unit agreement?

A. I don't believe so.

Q. Now, after 1941, can you say whether you dropped other lands out of the Fidelity operating

(Testimony of Cecil W. Smith.)

agreement beside those covered in the Husky agreement on which you had theretofore been paying the Federal rentals and royalties?

A. I don't think there were any dropped, and the only reason those were dropped in 8-A and 8-B was because of the setting up of the new boundaries of the units, which was done at the request of the U. S. Geological Survey.

Q. Isn't it a fact, Mr. Smith, you had a considerable acreage covered by agreements with Capital Gas Corporation in Township 8 North, Range 59 East, on which you quit making payments so far as royalties are concerned sometime prior to 1940, I mean Federal rentals, prior to 1940?

A. Federal rentals prior to 1940, I don't recall it.

Q. Do you recall anything about those Capital Gas lands up there in what is now Unit 4, as to whether they are still covered by your Fidelity agreement?

A. Which Capital Gas lands are you referring to?

Q. I am talking about Sections 1 and 3 and a portion of Section 9 and all of 11, 8 North, Range 50 East, it would be up in this—strike that last question, please. There are many cases where you [417] have the Fidelity operating agreement where there is no gas purchase contract either, isn't that true?

A. I don't recall any.

Q. What about up in Unit 1?

(Testimony of Cecil W. Smith.)

A. In Unit 1, we have a gas purchase contract up there.

Q. And that is true of all units up and down the line? A. That is correct.

Q. You have already testified as to Unit 8, now 8-A and 8-B, the operating agreement was made considerably prior to the time the unit agreement was signed, is that true? A. Correct.

Q. Would it likewise be true it was signed before the gas purchase contract was entered into down there? A. Yes.

Q. That likewise would be true of 6 and 7, the ones south of 5, is that correct?

A. That is correct.

Q. Now, with reference to the lands described in the Husky agreement at page 11, the lands that were relinquished, can you tell us what form the relinquishment took by way of formal action on your part?

A. My recollection is that in connection with the relinquishment of those lands, the owners of the leases executed a relinquishment to the United States — those were government leases — and also that they were released from the operation of the [418] Fidelity agreement, as I recall it.

Q. So, those lands, you think, reverted back to the Federal Government, is that correct?

A. Yes, that is correct.

Q. It seemed to me, Mr. Smith, there was included in that list some Northern Pacific lands that

(Testimony of Cecil W. Smith.)

had been relinquished. Would you say I was incorrect on that?

A. Yes, you are incorrect on that.

Q. At the time the Northern Pacific well was drilled, there was no unit agreement in effect as to then Unit 8, was there?

A. I am not sure of the date of the Unit 8 agreement. There was one that was negotiated, had been agreed to by the parties, and we were engaged in working out the terms of it with the U. S. Geological Survey. If it was not approved at the time the well was drilled, it was approved shortly thereafter.

Q. Have you said the Northern Pacific signed exactly the same operating agreement as the plaintiffs here, Form 247?

A. No, we signed the operating agreement; we have the leases on the Northern Pacific lands.

Q. That is the arrangement under which that was done? A. Correct.

Q. So that all the Northern Pacific land in the area is represented in the operating agreement through you, is that correct? [419]

A. Correct.

Q. I am a little confused as to the time of the cementing of the Carter well. I know the Carter well was finally abandoned in January, 1942. When would the cementing have occurred to which you referred?

A. The date I gave was the date they completed

(Testimony of Cecil W. Smith.)

cementing and recovered the last portion of the casing. The cementing lasted two or three days.

Q. The war having occurred in December, 1941, do you think there was a shortage of cement in early 1942?

A. I didn't say there was a shortage of cement. I said there was difficulty in getting steel pipe. They only put in 100 sacks of cement because they expected to shoot off their casing and recover it.

Q. Had the pipe shortage developed then by January, 1942?

A. In December, I believe it was December. It was about that time the limitation was put on drilling and securing of pipe, on the allocation of steel shortly after December 7, 1941.

Q. Who paid for the drilling of Northern Pacific No. 1 well? A. Fidelity Gas Company.

Q. And that was paid with Fidelity Gas checks, was it? A. My recollection is it was.

Q. Fidelity Gas Company maintained its own separate banking facilities, did it? [420]

A. I am not sure whether checks for material and things of that kind were paid with Fidelity checks or paid with Montana-Dakota checks and charged to Fidelity's account. Probably it was done both ways.

Q. Well, in fact, all of the Fidelity operations were actually paid for by M.D.U. money, were they not? A. Yes.

Q. Who paid for drilling the Smith well?

A. Fidelity Gas Company.

(Testimony of Cecil W. Smith.)

Q. Who paid for drilling the Warren well?

A. Fidelity Gas Company.

Q. As to the seismic work done by DeWolf, who paid for that?

A. I believe Fidelity Gas paid for that also.

Q. Had the operating agreements been executed at the time Mr. DeWolf did his preliminary work up there?

A. Which operating agreements are you referring to?

Q. The Fidelity operating agreements on Unit 5.

A. I believe they had. I think they were mostly executed in 1934.

Q. Who paid for the drilling of the Carter well?

A. Carter Oil Company.

Q. Who paid for the drilling of the Husky well?

A. Husky Oil Company.

Q. Who paid for the work done by the California Company?

A. The California Company. [421]

Q. Now, after the completion of the Warren well, how much money has Fidelity Gas paid for drilling, survey, or seismic work on the Cedar Creek Anticline?

A. It has not paid any itself. It has devoted its efforts to getting other people to come in there and to do the development.

Q. During the time the Warren and the N. P. No. 1 and Smith were being drilled, did Fidelity Gas have a staff of employees of any kind?

A. Well, the Montana-Dakota Utilities Company

(Testimony of Cecil W. Smith.)

was furnishing the staff that was required for that work.

Q. Do you recall whether they continued to be Montana-Dakota Utility Company employees during that period?

A. I don't think it makes any difference, particularly, whose employees they were, they were furnished.

Q. We think it does make a difference, so if you just tell me what you recollect as to how they were carried, Mr. Smith?

A. I don't recall how they were carried, as a matter of fact.

Q. You had to have field engineers and other employees during the drilling, did you not?

A. We had a field engineer that looked after the drilling, the building of roads, things of that kind, to carry on the operations.

Q. During that period of time—— [422]

A. Montana-Dakota Utilities Company was supplying a considerable part of that for Fidelity.

Q. Were Fidelity hiring some on their own account, do you remember?

A. I think geologists were hired by Fidelity for that work. Whose payroll they were actually on, I don't recall. The charges were charged to the cost of the wells and charged to Fidelity Gas Company.

Q. Under what arrangements were those three wells drilled, did you have a drilling contract with somebody, or how was that done?

A. Yes, we had a drilling contractor.

(Testimony of Cecil W. Smith.)

Q. So the equipment was not the property of Fidelity Gas?

A. That is correct; that is usual in the oil business.

Q. Now, since 1938, has Fidelity Gas had a geologist?

A. Yes.

Q. Paid for by Fidelity Gas?

A. No.

Q. Has that geologist been engaged in a study of the sands below 2,000 feet?

A. No, not particularly.

Q. And I would assume from what you have told me that Fidelity Gas as such has no engineer or staff of any kind, is that correct?

A. Correct. [423]

Q. And hasn't had since 1938?

A. All of those services were furnished up until 1938 and following by Montana-Dakota when it was necessary.

Q. But actually, you have indicated already that some of the cost of that, or probably all of the cost of that kind of service to Fidelity was reflected on Fidelity's books and charged against the wells, is that true?

A. Correct.

Q. Since that time have there been any charges reflected on Fidelity's books, reflecting the expense of engineers, seismic work, geologists, or anything else?

A. I don't believe we have, because we have negotiated with the companies that did the work out there to furnish the work themselves. Califor-

(Testimony of Cecil W. Smith.)

nia, Husky, Carter and Shell were all furnished under agreements we worked out with them.

Q. So, since 1938, the activities of Fidelity, as far as development work is concerned has been limited to these negotiations to which you refer, is that true?

A. I would say it was an important limitation.

Q. Would you explain that answer, Mr. Smith?

A. Yes. I would say that Fidelity's activity in securing development by these various companies is the most important activity that could be carried on as far as development of the anticline is concerned, and so far as benefits to all of the holders of Fidelity operating agreements. [424]

Q. Now, with reference to that, you testified yesterday at some length about the Carter and Husky contracts and negotiations with a Manning, and those negotiations, as I understand it, were primarily directed at Unit 8-A and 8-B, is that correct?

A. No, they were aimed at development anywhere on the structure. It happens in accordance with their geological theories, they wanted to start on Unit 8-A and 8-B first.

Q. The original Carter and Husky agreements as drafted, were both limited to lands described in Units 8-A and B, were they not?

A. That is correct.

Q. It wasn't until supplemental agreements were made that there was any reference in any of

(Testimony of Cecil W. Smith.)

your contracts to any lands outside of Units 8-A and B, is that true?

A. That is correct. We wanted to make them on Unit 8, or 8-A only to begin with.

Q. Pardon me, I didn't get Mr. Smith's answer. Read the answer.

(Answer read back by Reporter.)

Q. And it is a fact, is it not, that all the wells drilled in Unit 8-B are within a radius of about three miles, is that true?

A. That is correct.

Q. Now, at the time the N.P. well No. 1 was drilled, what was [425] your opinion as a result of that drilling as to the possibility of recovering oil in commercial quantities in Unit 8-B?

A. Read that question again.

(Question read back by Reporter.)

A. You mean at the conclusion of drilling and testing operations?

Q. Yes.

A. Well, it was our opinion that there might be additional production encountered at greater depths.

Q. In that general area?

A. In that general area.

Q. Now, as the result of the drilling of the Smith well, did your conclusion change any in that regard?

A. No, it did not.

Q. What about the effect of the Carter well?

A. Well, when the Carter well was completed, it was very difficult to judge what the results of the

(Testimony of Cecil W. Smith.)

drilling of that well actually were. That didn't give a great deal of information.

Q. You have testified here as to being President of Montana-Dakota Utilities Company, and you have testified as to rather extensive experience in this field of oil and gas, and with that background in mind, can you tell me whether or not in the general parlance of the oil and gas business, whether the Carter and Husky wells would be considered in the nature of [426] development wells or not?

A. Oh, I would say they were entirely in the nature of wildcat wells.

Q. Now, as to the Unit 5, did you make any specific attempt, or make any attempt, rather, to get specific contracts covering that unit similar to the contracts you got down in Units 8-A and B?

A. At the time we were negotiating those contracts on 8-A and 8-B, we were somewhat hesitant about making contracts for other points on the structure because we thought we might be able to negotiate better contracts as far as drilling obligations are concerned, as far as the rapidity of the drilling of wells and development was concerned.

Q. After the completion of the Warren well, what was your conclusion as to the possibility of getting commercial production in Unit 5?

A. We felt the possibility of getting commercial production anywhere along the structure at greater depths was very good.

Q. Tell us why, in the light of that, the Warren No. 1 well wasn't drilled to a greater depth?

(Testimony of Cecil W. Smith.)

A. Because at the time we had done about all the drilling we should do. We felt it was a problem for some major oil operator to come in and carry on development, and we were carrying on negotiations with the California Company for that company to do just that. [427]

Q. I think you have already answered it, but to be sure it is in the record, there were no negotiations with anyone under which you were trying to get a specific well in Unit 5?

A. The reason for that was they all felt the best possibilities were in 8-A and 8-B. That was the opinion of the geologists pretty generally.

Q. Was that your own opinion?

A. It was the opinion we held at that time. If we found production in 8-A and B, the possibilities of getting additional development on the anticline, and possibly on better terms, would be greatly facilitated.

Court: Court will stand in recess until 10 minutes after 11.

(10-minute recess.)

Q. After the completion of the Warren well, and for the balance of the years 1937, 1938, 1939 and 1940, there was no drilling going on to the deeper sands in the Cedar Creek Anticline on your behalf by anyone, was there?

A. That is correct. We were negotiating during that period of time with various companies for further development.

Q. So that at the time you place as sometime

(Testimony of Cecil W. Smith.)

in 1940 when Mr. Jirik and Mr. Seivers were in your office, there was no drilling going forward as of that date, was there?

A. Let's have the question again?

(Question read back by Reporter.) [428]

A. I don't think the date Mr. Jirik and Mr. Seivers were in the office was definitely fixed, so I couldn't say.

Q. It was sometime in 1940, you did testify to that.

A. I said it was probably sometime after 1940, but I didn't recall just when it was.

Q. Would you say it was sometime in 1941?

A. It might have been in 1941, and during that period we were negotiating with Carter, and they began their operations out there.

Q. Showing you a document marked for identification as Plaintiffs' Exhibit 50, which is on the letterhead of the Montana-Dakota Utilities Company, and is addressed to the stockholders of the Montana-Dakota Utilities Company, do you recall having seen that document before, Mr. Smith?

A. Yes, I do.

Q. And as part of your duties with the Montana-Dakota Utilities Company, would you have assisted in the preparation of that report?

A. Undoubtedly I did.

Q. It has a signature that seems to be that of Mr. Heskett, is that right? A. That is correct.

Q. It seems to be a genuine instrument so far as you can see? A. Yes. [429]

(Testimony of Cecil W. Smith.)

Mr. Erickson: We now offer Plaintiffs' Exhibit 50.

Mr. Lamey: No objection.

Court: It is admitted.

(Plaintiffs' Exhibit 50 admitted in evidence.)

Q. I call your attention to the exhibit merely for the purpose of putting it in the right place in the record. The next to the last paragraph, would you read that for us, please, Mr. Smith?

A. (Reading) "It is the company's intention to defer any additional plans for oil development until Well No. 3 has been pumped for a sufficient time to definitely determine its commercial possibilities."

Q. The letter is dated May 8, 1937?

A. The letter is dated May 8, 1937.

Q. The Number 3 well you are referring to, would that have been the Smith well?

A. That is correct.

Q. During the progress of the drilling of the Carter well and of the Husky wells, were there any reports made to the interested property owners or lease holders similar to those that were made as to the Warren well to the Unit 5 people?

A. You say similar to—what was it?

Q. Maybe I had better put the question a different way. The record shows in the year 1936 and 1937, you sent letters to people interested in the Unit 5 area, telling about the drilling [430] progress in your various wells. Were any similar letters sent to people interested in 8-A and 8-B at the time the Carter well was being drilled?

(Testimony of Cecil W. Smith.)

A. I don't recall those first letters were sent to all interested parties. My recollection is they were sent to those who had displayed particular interest as to what was going on and who had inquired. I think there was a letter written to Mr. Wight, and I believe one to Cedar Creek Oil and Gas Company during that period. There may have been one or two others, but they were not generally sent out, except as they displayed interest in the progress.

Q. Would you say they had been sent to Mr. Norbeck?

A. They may have been sent to Mr. Norbeck, because he had been vitally interested in the negotiation of the first agreement.

Q. So you are now saying these letters such as Exhibit 11 and 12 were not generally circularized among people who had holdings in Unit 5?

A. I think that is correct. You will notice each one of these is a separately typewritten letter.

Q. You said that Mr. Jirik talked to you about the Carter well. Do you recall whether you sent him any information on that by way of letter?

A. No, I am sure we didn't because he came in every 30 or 60 days, and we talked progress and what was going on and the [431] effect it would have on the general development.

Q. As to the Husky well, I think your testimony was you thought you talked it over with Mr. Jirik, but you weren't sure. Is that a correct statement of your testimony?

(Testimony of Cecil W. Smith.)

A. No, I am sure we talked it over because he was coming in frequently all during that period and up until 1950 or thereabouts.

Q. Mr. Smith, I think the testimony has shown you and Mr. Jirik had been on rather friendly ground over the years, isn't that true?

A. Correct.

Q. You will recall, do you not, Mr. Jirik's operations were transferred pretty much to Texas and Oklahoma in the year 1948 or 1949?

A. Yes, I know he didn't come in as frequently as he had prior to that time, but he still dropped in every time he came through Minneapolis, I assume.

Q. Are you sure you ever discussed the Husky well with Tom Jirik?

A. Yes, I am.

Q. Can you say with certainty whether you talked to him about it more than once?

A. Well, I would say it was very likely more than once.

Q. Where would those discussions have taken place?

A. In my office. [432]

Q. Can you fix the approximate time?

A. No, I cannot, but it was sometime during the time the well was being drilled from 1941 into 1942.

Q. So, if Mr. Jirik were to testify that no conversation took place, he would be mistaken, is that correct?

A. That is correct.

Q. Was the negotiations with Manning to result in his drilling for your account?

(Testimony of Cecil W. Smith.)

A. No, Mr. Manning was trying to interest various parties in taking over the drilling operations and development on the Cedar Creek Anticline.

Q. Before the recess, there was some discussion about the unitization of the Eagle sands and what transpired between you and the Cedar Creek Oil and Gas with relation to that. During the recess, we have secured these two instruments, Plaintiffs' Exhibit 51 and 52, and I will have you examine those, please. You are familiar with both of those documents? A. Yes.

Q. One of them, the yellow one, seems to be a carbon copy of a letter sent to you, and the other your reply, is that correct? A. That is correct.

Mr. Lamey: Do you offer them?

Mr. Erickson: Yes.

Mr. Lamey: No objection to 51 and 52. [433]

Court: Admitted.

(Plaintiffs' Exhibits 51 and 52 admitted in evidence.)

Q. These letters being letters which finally terminated discussions concerning the Eagle sands unitization, is that correct? A. Correct.

Q. I call your attention also to Exhibit 32, which has already been admitted, and is from H. C. Smith and directed to Montana-Dakota Utilities, and I will ask you whether or not that is a letter you received that terminated the negotiations with H. C. Smith?

Mr. Lamey: Is that already in evidence?

(Testimony of Cecil W. Smith.)

Mr. Erickson: Yes.

Q. Is that the final step in those negotiations, Mr. Smith?

A. I didn't remember the letter. I think it is.

Q. There have been admitted in evidence Exhibits 30 and 31, the one letter being from Mr. Smith entitled "Cancellation Notice," and the other your letter in response. Do you recognize that correspondence as I have described it? A. Yes.

Q. Now, as a result of receiving the letter entitled "Cancellation Notice," did you do anything by way of initiating drilling or testing on Unit No. 5? A. What drilling or testing do you mean?

Q. Any drilling or testing.

A. I don't believe so. [434]

Q. So that nothing was done or has been done on Unit 5 insofar as actual drilling or testing since the Warren well, is that correct?

A. You are referring to deep testing?

Q. Yes, deep testing.

A. Yes, that is correct.

Q. Do you have any correspondence with you, Mr. Smith, that would relate any of the details of the negotiations between you and the California Company? A. I don't believe I do.

Q. Do you know whether there was any correspondence?

A. I think there was correspondence, and as Mr. Davies testified, there was considerable verbal negotiation in connection with that.

(Testimony of Cecil W. Smith.)

Q. Do you know where their seismic testing took place?

A. It took place in Unit 8. We had furnished the seismic geophysical that we had made, and they make a check on that in Unit No. 8 to see whether their testing agreed with ours.

Q. Yesterday on the stand you were asked questions which had to do with Mr. Wight's testimony as to conversations he was supposed to have had with you in your office in 1937 and 1938, and you indicated that your relations with Mr. Wight at that time were such that he would not have come into your office. Is that a fair statement of your testimony?

A. I don't think I tried to testify as to Mr. Wight's [435] intention. My testimony was to the effect that I did not recall that he was in the office at any time during that period of time, and the relations were such that I didn't think the conversations he related took place.

Q. What did you mean by that, Mr. Smith?

A. That we would have a series of discussions in connection with the abandonment of our operations, because at the time we were negotiating for additional drilling.

Q. So that it isn't your testimony that there was something by reason of your personal relationship with Mr. Wight that would make it improbable that he would come into your office, is that a fair statement?

(Testimony of Cecil W. Smith.)

A. I say I can't testify they were such as would make it improbable he would come in the office.

Q. What did you mean?

A. I meant under the conditions, I didn't think it was likely he would.

Q. Do you suppose he would have been in the office on any other matter beside the Warren well?

A. I don't think so.

Q. And why would it not be likely that Mr. Wight would be concerned and come down to see you after the Warren well was abandoned?

A. Well, he did not come down, so I can't testify as to why it would be unlikely. [436]

Q. You did testify that yesterday.

A. I testified he was not in the office and that there were no such conversations.

Q. But you also testified that something occurred after 1935 which would make it unlikely that Mr. Wight would come down to your office.

A. I don't recall that was just the language.

Q. That may not be. I would like to know now what you did mean?

A. I thought that in view of the litigation that was pending it was not probable he would come in the office to discuss these matters, and there were no such discussions according to my recollection.

Q. As to the Warren well, there was no litigation pending between you and Mr. Wight, or your firm and Mr. Wight's group at that time, was there?

(Testimony of Cecil W. Smith.)

A. No, not as to the Warren well or as to the Fidelity agreements.

Q. Now, referring again to the litigation, I think the record already shows at the time the various agreements were negotiated, there was then pending litigation, that is true, is it not?

A. That is correct.

Q. Was there something that occurred after 1935 and before 1937 with relation to this litigation that would change your [437] personal relationships with Mr. Wight?

A. Let's hear that question again?

(Question read back by Reporter.)

A. No, I don't recall that there was.

Q. And you say now that during the years 1937 and 1938, Mr. Wight was not in your office for any purpose?

A. Yes.

Q. I call your attention to certain negotiations that were going on between you and Mr. Wight concerning the Bowdoin field. Do you recall those negotiations?

A. No, I don't recall there was any negotiations with respect to the Bowdoin field.

Q. Do you recall any conversations or discussions between you and Mr. Wight in 1937 and 1938 concerning the Archer lease?

A. No, I don't think I ever discussed the Archer lease with him.

Q. Do you recall writing him about the Archer lease?

A. I might have written, as he did inquire.

(Testimony of Cecil W. Smith.)

Q. Do you recall whether during 1937 and 1938, there were discussions and correspondence between you and Mr. Wight, rather voluminous in volume dealing with the manner of payment for gas and keeping leases up and various other things?

A. I don't recall it now; it is entirely possible.

Q. I show you a letter marked for identification as Plaintiffs' Exhibit 53, and ask you if you have seen that before? [438]

A. Yes.

Q. Do you recognize that instrument?

A. Yes, I do.

Q. And that is on the letterhead of the Montana-Dakota Utilities Company, is it not?

A. That is correct.

Q. It bears your signature?

A. Correct.

Q. In the last paragraph, the letter being dated December 14, 1938—

Mr. Lamey: May I see it. I don't think it is in evidence yet, counsel.

Mr. Erickson: I am sorry.

Mr. Lamey: No objection.

Mr. Erickson: We offer Exhibit 53.

Court: Admitted without objection.

(Plaintiffs' Exhibit 53 admitted in evidence.)

Q. Calling your attention to the first sentence in the last paragraph, which reads "Confirming our conversation with Mr. John Wight when he was in the office—" Do you know to what that referred?

A. I think that referred to a visit that he had made a few days previously, I am not just sure

(Testimony of Cecil W. Smith.)

when it was. I would call attention to the fact the letter is dated December 14, 1938.

Q. You have attorneys to call my attention to that. I would [439] like to have an answer to my question, and the record already shows the date of it, but you do recall after having read this now that Mr. Wight was in your office in 1938?

A. That is the only recollection I have of it is that letter.

Q. But this is your letter, is it not?

A. That is correct.

Q. Now, are you still prepared to testify that Mr. Wight was not in your office in 1938 in the light of your letter?

A. I believe the date we are talking about is sometime in March, 1938.

Q. I just asked about 1938, now, Mr. Smith.

A. I was testifying as to the dates between March, 1937 and March, 1938. The occasion for this letter was that there had been a unit plan filed sometime in 1938 and he was inquiring about the renewal permits in the Bowdoin field at that time.

Q. Now, I will show you a series of letters with the first dated July 10, 1937, and the last November 28, 1938, marked as Plaintiffs' Exhibit 54, all of them being on the letterhead of Montana-Dakota Utilities Company and bearing your signature, and ask you if they look to be genuine?

Mr. Lamey: May it please the Court and counsel, we have one witness, Mr. R. M. Heskett, I think will take but a few minutes. He would like to get

(Testimony of Cecil W. Smith.)

back to Minneapolis on this noon train. If it is agreeable to counsel, we might suspend with Mr. Smith and call Mr. Heskett. [440]

Mr. Erickson: I am sure that will be agreeable, we have no objection.

Court: You may step down, Mr. Smith.

(Witness temporarily excused.)

R. M. HESKETT

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Mr. Lamey: Mr. Heskett has called my attention to the fact he is going on a plane rather than the train. I would like to get him out of the way.

Q. Is your name R. M. Heskett?

A. Yes, sir.

Q. And do you live in Minneapolis, Minnesota?

A. Yes, sir.

Q. At the present time, what is your position, or what office do you hold with the Montana-Dakota Utilities Company?

A. Chairman of the Board.

Q. How long have you been Chairman of the Board?

A. About a year and a half, I believe.

Q. And prior to that, what office had you held with Montana-Dakota Utilities?

A. I have been President several years, and before that I was [441] Vice President.

(Testimony of R. M. Heskett.)

Q. Had that relationship in one office or another extended throughout the life of M.D.U.?

A. Yes, sir.

Q. Mr. Heskett, Mr. Jirik has testified to the effect that late in 1937, he talked with you at your office in Minneapolis, and at that time you told him that Fidelity was all through with drilling for oil. Did you, at that time, or any other time, make that statement or a statement to that effect to Mr. Thomas Jirik?

A. I did not.

Q. Did you, at that time, or at any other time, state to Mr. Jirik that Fidelity was all through drilling for oil and that it had given up its program for the development of oil in the Cedar Creek Anticline?

A. I did not.

Q. Mr. John Wight has testified to the effect that he talked with you on several occasions, perhaps three or four, in 1937 and 1938, at your offices in the Montana-Dakota Utilities Company in Minneapolis, and that you told him you were through drilling for oil, that you were not going to do any more development as far as oil was concerned. Did you, during the time stated, or at any other time, make such statement, or statements to that effect?

A. I did not. [442]

Mr. Lamey: You may cross examine.

Cross Examination

Q. (By Mr. Erickson): Mr. Heskett, can you tell us who the President of Fidelity Gas is?

A. Mr. Wilbur Hayes.

(Testimony of R. M. Heskett.)

Q. During the period of the years 1937 and 1938, can you tell me whether Tom Jirik stopped occasionally in your offices in Minneapolis?

A. I don't recall the year, but he has been in our office very frequently for a long time.

Q. And your relations with Mr. Jirik have been friendly, have they not? A. Yes.

Q. And would you say there have been many visits between you and Mr. Jirik in your offices?

A. Yes, I would say quite a few.

Q. Would that go back to the period 1936, 1937 and 1938?

A. Well, I am not sure of the date when his calls started, but it is quite likely.

Q. Do you know Mr. George Seivers?

A. I don't remember him.

Q. The gentleman who testified here who is Secretary of the Cedar Creek Oil and Gas Company.

A. I didn't hear him testify.

Q. Do you recall Mr. Seivers ever being in your office with Mr. Jirik? A. No, I don't.

Q. As to Mr. Wight, can you say what your relationship with Mr. Wight was during the earlier years, 1935, 1936, 1937 and 1938?

A. Well, at that time he had a number of lawsuits against us, so I would say we weren't very friendly.

Q. Would you say during that period he was ever in your office at all?

A. I don't remember of his being in at all during that period.

(Testimony of R. M. Heskett.)

Q. Do you remember any occasion when Mr. Wight was out at your home? A. No, I do not.

Q. Mr. Heskett, in these various matters dealing with the Fidelity gas operation, can you say whether or not Mr. Smith has been the man more immediately in charge of those operations?

A. That is correct, yes, sir.

Q. You yourself at the time of the drilling of the Warren well and the N.P. well and the Smith well took a very active interest in them, did you not? A. Yes.

Q. You were in the field yourself? [444]

A. Yes.

Mr. Erickson: That is all we have.

Mr. Lamey: That is all, Mr. Heskett. May Mr. Heskett be excused.

Mr. Erickson: Yes. At the same time I would like to have it agreed, and counsel has agreed, that Mr. Seivers be excused. Mr. Seivers is going on the Northern Pacific.

Court: Very well, Mr. Seivers and Mr. Heskett are permanently excused.

(Witness excused.)

CECIL W. SMITH

recalled as a witness on behalf of defendants, having previously been sworn, testified as follows:

Cross Examination—(Continued)

Q. (By Mr. Erickson): Now, calling your attention to this proposed Exhibit 54, will you say whether or not those represent original letters

(Testimony of Cecil W. Smith.)

signed by you and on Montana-Dakota Utilities' letterheads? A. They do.

Q. They deal with various subjects including the Archer well and the Bowdoin negotiations, do they not?

A. I didn't see one in there on the Archer well.

Q. There is one in there, and I'll find it for you—Armstrong.

A. Yes, there was correspondence in regard to the Armstrong [445] well.

Mr. Lamey: What is the purpose, to show there was correspondence?

Mr. Erickson: The purpose is we have run into a situation where witnesses have testified yes and no, and the matter of the credibility of the witnesses, and the matter of their memories and various other things are here involved. These letters merely show a course of business dealings between these two gentlemen during the period of 1937 and 1938 to show their relationship, and also the matter of whether or not it is likely Mr. Wight might have been in Mr. Smith's office during that period.

Court: Do they show he was in the office?

Mr. Erickson: There is one.

Court: Yes.

Mr. Erickson: No, these letters show there were business transactions, and that as a result of business, he might have been in. The impression that Mr. Smith left on me yesterday, and I believe the record shows it, is that the relationship between he and Mr. Wight was so unfriendly during the period

(Testimony of Cecil W. Smith.)

that Mr. Wight would not have had the audacity to come in the office, and Mr. Heskett bore that out by saying the relations were unfriendly with Wight, and Wight would not have been likely to come in their office, and these letters show business dealings and refute any inference or suggestion that might be [446] in their testimony.

Mr. Lamey: Will you put them all in?

Mr. Erickson: As one exhibit, we offer them.

Mr. Lamey: We object as incompetent, irrelevant and immaterial, that the contents of these letters go into evidence. We have no objection to counsel developing the circumstances on which the letters were written, but I think the letters themselves are incompetent.

Court: It is for the limited purpose of showing business relations, but not to prove or disprove any particulars referred to in the letters?

Mr. Erickson: No, and there is no reference in those letters to anything involved in this litigation, and they couldn't be the basis for us trying to expand the issues or having any effect or bearing on the case at all.

Court: The objection is overruled, and they are admitted.

(Plaintiffs' Exhibit 54 admitted in evidence.)

Q. The testimony of both Mr. Wight and Mr. Jirik was to the effect, and they purported to quote you, that you had been subject to criticism by the stockholders of the Montana-Dakota Utilities Company because of the expenditures being made on oil

(Testimony of Cecil W. Smith.)

development, and, as I believe you have already testified, you had no conversation with Mr. Wight at all. You have also testified that you did not make that statement to Mr. Jirik, is that true? [447]

A. Correct.

Q. Can you tell us whether there was any criticism from your stockholders because of the activity in the oil development at that time?

A. There was not.

Q. Was there any discussion?

A. No, there was not.

Q. But you have testified that the money being spent was actually Montana-Dakota Utilities Company money, is that correct?

A. That is correct.

Q. The conversation between you and Jirik and Seivers, the date of which there is still some uncertainty about, but probably taking place sometime in 1940, can you tell us what that conversation was?

A. Well, as I recall the conversation that we had that day, we had drilled an Eagle sand well prior to the conversation on their lease, and they came up to discuss the possibility of having further drilling done to the Eagle sand on their lease. That was my recollection of what the conversation was about.

Q. And their testimony is to the same effect to that extent, they said that also was a matter of discussion, but insofar as the further statement of Mr. Jirik and Mr. Seivers that you said in effect as to oil, you were all through, they are [448] wrong on that, is that correct?

(Testimony of Cecil W. Smith.)

A. They are not only wrong on that, but they were wrong on the date.

Q. Why were they wrong on the date?

A. It was after 1940.

Q. Why are you sure of that?

A. Because the first Eagle sand well completed on their lease was completed in 1940.

Q. As to that particular statement, you say they were wrong, is that true? A. Correct.

Q. And that no such statement was made?

A. That is correct.

Q. Mr. Smith, did you have any conversation with your bankers about 1937 about whether they would approve continued drilling to the deeper sands? A. No.

Q. And no such conversation took place?

A. No.

Q. At a later date? A. No.

Q. Ever? A. No.

Q. Now, Mr. Jirik has testified that in conversations that [449] he held with you alone in your office earlier than this conversation in which the three of you participated, whatever its date, that you said you were abandoning all your oil operations in Montana, you heard that testimony? A. I did.

Q. That is incorrect?

A. That is incorrect.

Q. There was no such conversation?

A. There was no such conversation.

Q. At any time?

A. At any time.

(Testimony of Cecil W. Smith.)

Q. And you heard him testify that you told him that Montana-Dakota Utilities Company was a public utility and not an oil wild catting outfit, and for that reason you were through?

A. I don't recall any such conversation with him. As a matter of fact, during the period you are talking about, we were negotiating with the California Company to carry on drilling, so that it would be entirely unreasonable that I would make any such statement to him as that.

Q. When did you start negotiations with the California Company? A. 1935.

Q. And you tell me your negotiations with California had to do with Unit 8, is that correct?

A. No, they had to do with the entire structure. [450]

Q. Those negotiations were continuing during the years 1937 and 1938?

A. Up until January, 1939.

Q. But in fact, at the time Mr. Jirik says he was in there in 1937 or 1938, you had quit entirely on your own drilling program, is that correct?

A. We had quit our drilling program, and as I recall, we were still testing and pumping on the Smith well until the middle of 1938 to determine just what it would do.

Q. But as of the time when he says he was in your office, when conversations between the two of you were going on in 1938, there was no drilling in Unit 5? A. That is correct.

Q. You had determined then you were not going

(Testimony of Cecil W. Smith.)

to do any more drilling on Unit 5 on your own account? A. I think that's right.

Q. So that as to the conversation reported by Mr. Jirik in which the matter of you being a public utility, that conversation just didn't occur, is that correct?

A. I just don't recall any such conversation. I am sure it didn't take place.

Q. Mr. H. C. Smith testified that there had been no discussion of the Shell agreement when you bought his Judith sands. You heard that testimony?

A. Yes. [451]

Q. He is in error in that statement?

A. That is correct.

Q. And his statement does not square with the fact? A. That is correct.

Q. How many times did you see Mr. Haney?

A. I believe twice.

Q. Do you recall that one of the times you saw Mr. Haney was at his home, and he was quite ill?

A. He was at home both times, and I believe the first time we went out there, they said he had a heart attack and we could only talk a certain period because his health was poor.

Q. That discussion was short, was it not?

A. I think it lasted about an hour and a half or two hours, somewhere along in there.

Q. Was it that conversation in which you say the deeper sands were discussed with relation to the Shell agreement? A. Yes.

(Testimony of Cecil W. Smith.)

Q. When Mr. Haney testified no such conversation took place, he is wrong?

Mr. Johnson: Just a minute, he didn't so testify.

Q. I am sorry. When Mr. Haney testified when you were negotiating the purchase of the Judith sands that he was assured the purchase would have no effect on the lower sands, can you say whether that conversation took place?

A. We had a long discussion with respect to the Fidelity [452] operating agreement, the gas purchase contract, and the unit plan, and as I recall, in the discussion we told him that the sale of the Judith River sand to us was not going to affect the maintenance of the lease with respect to the rest of his rights as he had them under those agreements.

Q. And did you say there was a further discussion of the Shell agreement?

A. Yes, a very complete discussion because they wanted to know what the effect of the making of the Shell agreement would be on the Fidelity operating agreement, and what effect it had on their interests.

Q. As to the purchase agreement to which we have just referred under which Haney sold you his interests in the Judith sands, which is Exhibit 24, that was prepared by you, was it not, or by somebody under your direction?

A. It was prepared by us, and it was sent to them for their approval.

Q. But the language that appears in it and all

(Testimony of Cecil W. Smith.)

through it, was language that was supplied by you, is that correct?

A. In the first part, yes. I don't know what corrections were made during the period of discussion.

Q. But the actual drafting was done by you?

A. Yes.

Court: Court will stand in recess until two o'clock.

(Noon recess.) [453]

Mr. Erickson: We have no further cross examination.

Mr. Johnson: If the Court please, we have had marked as Defendants' Exhibits 55, 56 and 57, photostats of three documents, one being an assignment from George and Jane Norbeck to Atlantic and Pacific Oil Company, that is 55; 56 is an assignment from Atlantic and Pacific Oil Company to Cecil W. Smith; and 57 is an approval of the assignment, dated July 1, 1954, by the Chief of the Branch of Leasing, Division of Minerals, United States Department of Interior. These show the interest of Mr. Cecil W. Smith in one of the parcels of land in which there is evidence that the plaintiff, Susan Wight also has an interest. We offer these under stipulation of counsel that photostats may be introduced in lieu of originals.

Mr. Erickson: That is correct, but I do object to their admission on the ground they are incompetent, irrelevant and immaterial, outside the issues of the case.

Mr. Johnson: We offer them, your Honor, for

(Testimony of Cecil W. Smith.)

the purpose of showing that with respect to this particular parcel there is undivided ownerships, but we have persons of whom Susan Wight is one, and Mr. Smith is another. The parcels are subject to the Fidelity operating agreement, and we felt we would like the record to show the divergence of ownership because of that circumstance.

Mr. Erickson: I would add to my objection that Mr. Cecil [454] Smith, in whose name these appear, is not a party to the action.

Court: Yes, I don't see their materiality myself. If you think they amount to something, I can't see it, but I will be glad to reserve my ruling on it and let you argue the matter in your brief.

Mr. Johnson: That is satisfactory. We merely wanted them in to——

Court: I don't see what they can do.

Mr. Erickson: That is satisfactory to us. We don't feel the necessity of introducing any counter-proof on the matter.

Redirect Examination

Q. (By Mr. Lamey): Mr. Smith, during your cross examination, Mr. Erickson questioned you with reference to compensatory royalty understandings or agreements with some of the Wight group in this Unit 5. Do you recall that? A. I do.

Q. Do you know, if you understand, with reference to at least the Capital Gas lands which were involved and part of the lands in this suit, whether or not they were the subject of an agreement with

(Testimony of Cecil W. Smith.)

reference to compensatory royalties on or about the date of the meeting at Billings with the U.S.G.S.?

A. Yes, they were subject to agreements.

(Defendants' Exhibits 55, 56 and 57 admitted on reserved ruling.) [455]

Q. We show you Exhibits 58 and 59, and ask you to examine them and tell me whether or not you can identify them as the agreements to which you have just referred?

A. Yes, I have examined Exhibits 58 and 59, and they are the agreements to which I have referred.

Q. And with whom?

A. Exhibit 58 is a letter agreement from Capital Gas Corporation to Gas Development Company, authorizing the purchase of gas from lands which they controlled in Unit No. 5; Exhibit 59 is a letter agreement from the Capital Gas Corporation authorizing the purchase of excess gas above the amount which would be available to them under the unit plan for the purpose of reimbursing the government for the amount of compensatory royalties then due.

Mr. Erickson: I will object to the exhibits because they deal with lands not covered in this litigation.

Mr. Johnson: They are lands within Unit 5.

Mr. Erickson: They are lands within Unit 5, but they are not lands involved in this litigation.

Court: Well, this is in rebuttal, at least to the inference drawn from counsel's questions to the

(Testimony of Cecil W. Smith.)

effect that no such arrangements had been made. With reference to the other——

Mr. Lamey: That's right, we had that testimony on cross examination, and I merely want to demonstrate the type of agreement that was made. Were these the only agreements made, [456] Mr. Smith?

A. There was a similar agreement executed by George Norbeck covering lands included in the permit which he held at the time also.

Court: I will overrule the objection.

(Defendants' Exhibits 58 and 59 admitted in evidence.)

Q. Mr. Smith, in connection with the agreement with Carter Oil Company for the drilling of a well in the Little Beaver area, I believe either on or about that same date, you made another agreement which has been introduced in evidence here with reference to an option on the balance of the acreage of Fidelity in the Cedar Creek Anticline?

A. Yes, there was an additional agreement made.

Q. I show you Defendants' Exhibit 44, and ask you if that is the supplemental agreement covering the lands on all of the other units in the Cedar Creek Anticline?

A. Yes, that is the supplemental agreement that covers lands in Units 1 to 7, inclusive.

Q. Now, in connection with the Husky agreement and the drilling of its well, did you have a letter agreement with reference to the lands in which that company, Fidelity, or Montana-Dakota Utilities were interested in Units 1 to 7 of the Cedar

(Testimony of Cecil W. Smith.)

Creek Anticline? I show you now Defendants' Exhibit 47, and ask you if that is the letter agreement?

A. Yes, that is a letter agreement with the Husky Refining [457] Company covering the lands in which Fidelity had an interest in Units 1 to 7, inclusive.

Q. In your cross examination there was some questions with reference to the percentage of the area within the unitized portion of the Cedar Creek Anticline being covered by the Fidelity operating agreement, do you recall that? A. Yes.

Q. And then, if I understood one of the subsequent questions, I believe, under that same reference of 90 percent, there was much made of the gas unit agreement, and I would like to have you state now just what the situation is as to the area in the unitized portions of the Cedar Creek Anticline covered by this Fidelity operating agreement?

A. I believe I testified on direct that approximately 90 percent of the unitized area in the Cedar Creek Anticline was covered by the deep test operating agreements with Fidelity Gas Company.

Q. And that is the fact, is it not?

A. That is correct.

Q. Now, when you were negotiating the agreement for the purchase of the gas from Smith and Haney, I believe, in May of 1952, you spoke of some changes that may have been suggested by at least Mr. Smith or someone on the other side of that negotiation. Were any of these changes made in the office of Attorney Prudohn? [458]

(Testimony of Cecil W. Smith.)

Mr. Erickson: May I have the question read?

(Question read back by Reporter.)

Mr. Erickson: No objection.

A. Yes, I think there were. I believe that there was discussions in Mr. Prudohn's office as to changes in the agreement that had been suggested to him, and the suggestions were worked out and agreed to there.

Q. Mr. Prudohn was an attorney, was he not?

A. Yes.

Q. And whom was he representing in these negotiations?

A. He was representing H. C. Smith.

Mr. Lamey: That is all.

Recross Examination

Q. (By Mr. Erickson): Mr. Smith, when you say you believe it was discussed in Prudohn's office, was there discussion, or wasn't there?

A. There was discussion.

Q. And were there changes made?

A. I think there were.

Q. Well, are you sure there were?

A. Yes.

Q. Can you tell us what those changes were?

A. No, I can't tell you at this time because I don't recall just what the discussion was about.

Q. Do you recall whether it was necessary to have the contract retyped as a result of those discussions?

A. I believe it was retyped following those dis-

(Testimony of Cecil W. Smith.)

cussions, and it was subsequently sent to Mr. Prudohn for execution.

Q. It wasn't retyped then and there, is that correct? A. That is my recollection.

Q. Can you tell us from looking at the Exhibit 29, which bears execution date of June 12, 1952, what changes were made as a result?

A. No, I cannot.

Q. What was the date you were in Mr. Prudohn's office?

A. I don't recall; it was sometime early in May.

Q. With relation to the Capital Gas lands that are in the Exhibits 58 and 59, none of those lands are now in the ownership of these plaintiffs, are they? A. I believe not.

Q. And who owns this Capital Gas land now?

A. I believe that Montana-Dakota Utilities Company owns it.

Mr. Erickson: That is all.

Mr. Lamey: That is all.

(Witness excused.) [460]

WINSTON COX

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Lamey): Your name is Winston Cox? A. Yes, sir.

Q. Do you live in Billings, Montana?

A. Yes, sir.

(Testimony of Winston Cox.)

Q. How long have you lived here?

A. 12 years.

Q. What is your business?

A. I am an oil and gas lease broker.

Q. And how long have you been engaged in that business?

A. About 15 years.

Q. Will you tell us briefly what that business consists of generally?

A. Well, primarily I am what you would call a custom broker, and I take buying orders for a company and go into a prescribed area to buy leases for a certain price. Probably, oh, between 25 percent and 40 percent of my business is buying and selling leases on my own account.

Q. And prior to engaging in that business in Billings, had you been previously engaged elsewhere in the same business?

A. For three years in Bismark, North Dakota.

Q. And during the period particularly since discovery of oil by Amerada in May of 1951 near Williston, North Dakota, have you been more or less familiar with the oil and gas leasing and brokerage business in Eastern Montana?

A. Yes, I have.

Q. Are you familiar with an area known as Cedar Creek Anticline, and which is set forth in the two U.S.G.S. maps on the wall, marked Exhibit 1 and 1-A?

A. Yes, I am.

Q. Do you recall the discovery of oil at Ritchie, Montana, on or about July, 1951?

A. Very well.

(Testimony of Winston Cox.)

Q. And did you know about the discovery of oil by Shell in the Pine Unit in the Cedar Creek Anticline on or about the month of October, 1951?

A. Yes.

Q. And did you know about the discovery of oil by Shell in the Little Beaver area in the Cedar Creek Anticline in about June, 1952? A. Yes.

Q. Now, prior to 1951, have you had some occasion to investigate and deal in oil and gas properties in the Cedar Creek Anticline?

A. About that time I became interested.

Q. Do you know what the average price was for acreage in the [462] Cedar Creek Anticline during 1950?

Mr. Erickson: To which we will object on the ground it is immaterial, irrelevant and outside the issues of this case.

Mr. Lamey: Your Honor, it is in connection with our defense of estoppel. We have alleged there has been a great increase in values of mineral land. As a matter of fact, I think plaintiffs have also made similar allegations.

Court: Overruled.

Mr. Lamey: I am merely laying a background to bring it down to subsequent events.

Court: Overruled.

A. I would like to have the question read.

(Question read back by Reporter.)

A. Well, actually, there probably hadn't been a market developed at that time, there was so little interest in the area, at least from my end of it. At

(Testimony of Winston Cox.)

that time there was considerable acreage on the anticline, or immediately adjacent to it, which was still available for filing, that is, Federal acreage that you could acquire for 50 cents per acre.

Q. Did you during that year of 1950 acquire some such acreage? A. Yes.

Q. Now, what was the situation on or about July 24, 1950, in the Pine Unit with reference to ability to acquire acreage at a price? [463]

Mr. Erickson: We would object to that on the ground it couldn't be material. The Pine Unit is not Unit 5.

Mr. Lamey: I'll lay a foundation for that.

Q. Generally in the year 1950, and until there was a discovery in the Pine Unit and in Little Beaver, was there any particular variance between the value of leases up and down the Cedar Creek Anticline from the Pine to Little Beaver?

A. No, I would say there was no particular hot spot.

Q. On or about July 24, 1950, did you have occasion to purchase a lease on Section 28, Township 12 North, Range 57 East, in the Pine Unit?

A. What was that date, please?

Q. It is July 24, 1950. Do you have any memorandum?

A. May I refer to my notes? That was when I disposed of that lease. I had owned it about a year previous to that.

Q. You disposed of it then at what price?

(Testimony of Winston Cox.)

A. Two dollars——

Mr. Erickson: To which we will object on the ground and for the reason it is incompetent and irrelevant. May I point out it deals with a specific piece of property, and in an area which is 30 miles from the Unit 5, and could not be used to prove the value or anything else.

Court: There has been evidence that this is one structure, and this witness has said there was no difference in the prices in one unit from the other, and its distance from the [464] particular lands involved here would be something the Court would take into consideration in weighing what the effect of the evidence is worth, but the objection is overruled.

Mr. Erickson: May I make the further objection that to pick an isolated tract and have the price on it without anything further that that was a typical price could not possibly serve to prove value.

Court: I think it is not, the particular sale is not used to establish the price, but as background and illustrative of his experience in the area. In other words, market price is not proved by a particular sale, but when the witness has testified with reference to the general market there, then his particular experience may be used to substantiate his opinion with reference to the general market, but the particular price is no proof of market.

Mr. Erickson: I would say, then, there would be the further objection here for lack of foundation.

(Testimony of Winston Cox.)

I am willing to agree Mr. Cox has been in the business, but whether he dealt extensively in 1950 in these particular leases doesn't appear.

Court: Very well.

Q. Mr. Cox, during the year 1950, was there very much dealing in acreage on the Cedar Creek Anticline?

A. To tell what happened then, that was the year that Charles Edmudson and a group of fellows took a big spread of [465] acreage up and down the entire length of the anticline where available, and there was a great deal of acreage available. It was all open. They filed on Federal lands at 25 cents per acre, with the understanding when leases were issued, they would pay an additional 25 cents per acre. Then, on this date we are now discussing, Shell, and I believe one other company, began a buying campaign on the anticline with a top of \$2.50 per acre. It was at that time I sold this one section in question, and another one, and Charles Edmudson at the same time sold a number of acres at the same price.

Q. When you refer to the anticline, do you refer to the area upon or outside the unitized portion?

A. The great majority, if not all, of the land within the unitized area was unavailable. However, at that time, we didn't think the unitized area was all there was to it. It looked like it was going to be a great large area.

Q. Tell us what the situation was from then on?

(Testimony of Winston Cox.)

This is the middle of 1950. What was the situation with reference to the value of interests in acreage on the Cedar Creek Anticline?

A. With the exception of this one buying order at \$2.50 an acre, I don't believe very much acreage changed hands.

Q. Do you know of any acreage being put up for sale by the State early in 1951 in the anticline?

A. Yes, there was acreage.

Q. About when was that? [466]

A. May I refer to my notes? The actual sale was held February 20, 1951, so the land would have been advertised for at least three weeks previous to that.

Q. Were you familiar with any of the land in the anticline that was sold at that sale?

A. Yes, I bid in the state sale on February 20, 1951, and purchased two tracts.

Q. And where were they?

A. One of them was the East half of 16, 12 North, 57, which would be the northern end of Pine. I purchased that for \$5.50 per acre; and the other was the West Half of 16, 11 North, 57 East, which would be the south end of Pine, which I purchased for \$10 per acre.

Q. What happened to prices in the anticline following the Pine discovery in the northern part of the anticline about October, late in 1951?

A. At that time, we still had some of our own acreage left, and others that I know had acreage, and we became familiar with the fact that Shell had

(Testimony of Winston Cox.)

a \$25 top in some areas to buy leases, and a \$50 top in other areas.

Q. Speaking of areas within the anticline or outside?

A. Both immediately within and immediately adjacent. They greatly enlarged the scope of their anticline in their buying order.

Q. Did those prices extend quite generally up and down the [467] anticline?

A. These specific areas, and I had them specifically, would have, oh, it would have represented an area of at least 50 to 75 thousand acres.

Q. Now, did you have occasion——

Court: That doesn't answer the question, I believe. I don't understand it.

Q. Where were those lands you have just referred to with reference to the anticline.

A. Actually, I was looking at the map the other day. This was before Cabin Creek. A portion of the outline was what is now the Cabin Creek area.

Q. Can you point that out on the map?

A. I can. Cabin Creek is here (indicating).

Q. You are now pointing to Exhibit 1, is that right?

A. Yes.

Q. The lower portion of it?

A. Yes, and these particular areas actually extended from, I would say here (indicating) probably down through the area that you are discussing, and also a paralleling trend immediately east.

Q. Now, you say from here——

(Testimony of Winston Cox.)

Mr. Erickson: May I point out that this map attaches on here (indicating).

A. Well, it would cover both areas then. [468]

Q. You first pointed, did you not, to what has been designated as the Pine area?

A. No, the Pine area would be up here (indicating). I believe in the Pine area they had the lease situation in control then, and I don't believe the map I had at that time covered the Pine area.

Q. You are referring in general then, from the area in Unit 1 down to Unit 8 in the Little Beaver, is that correct?

A. Correct. The first play on the anticline was from the Pine Unit north. Actually, the southern end of the anticline wasn't being played by fellows such as myself until a considerably later date.

Q. Now, what transpired then, or what took place with reference to values of lease interests in the area after the discovery at Pine?

A. Well, for a specific example, I went back and bid on another tract in the October 7, 1952——

Q. Was that a State sale?

A. State sale, and bid \$430 per acre for the Northeast Quarter of 16, 11, 57, which is also in Pine.

Q. Now, in February 20, 1951, had you previously purchased at a State sale the East Half of that same section, 16, for \$5.50 per acre?

A. No, I purchased the West Half of that same section for \$10 per acre. [469]

Q. Now, before the Shell discoveries at Pine and

(Testimony of Winston Cox.)

Little Beaver—strike that out. After the discovery of Pine and Little Beaver, what was the situation with reference to lands up and down the anticline, and particularly in these units 1 to 8?

A. Well, they were so closely held that there was very little trading.

Q. But as to values, were the same values reflected?

Mr. Erickson: To which we will object on the grounds the witness has said there was no market to determine the value by.

Court: That is as I understood him. Was there a market?

A. There would have been a market had there been acreage available.

Court: Yes, but if there was no acreage available, there is no market, there is no market in the accepted sense. You can go ahead and prove values in any other way.

Q. As to values, you have described a specific instance where from February 20, 1951, the value went from \$10 to a price of \$430 on October 7, 1952?

Court: Pardon me, I wonder is there any question that since the discovery of oil that the value of oil rights has increased tremendously.

Mr. Lamey: I am surprised counsel is objecting because it is something he has alleged.

Mr. Erickson: I am willing to agree values have gone up, but I wouldn't want to sit here and have

(Testimony of Winston Cox.)

Mr. Erickson: May I point out that this map attaches on here (indicating).

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Mr. Erickson: I am willing to agree values have gone up, but I wouldn't want to sit here and have

(Testimony of Winston Cox.)

values fixed [470] without a little more foundation on it.

Court: Well, it seemed to me, so far as that is concerned, it is not important to either of you to fix specific values, it is just the question that there has been a tremendous increase in value. I, myself, not knowing anything about it, would suppose that is what would happen.

Mr. Erickson: That's right, but we wouldn't want to admit there has been a tremendous increase. There has been some increase, yes.

Court: Well——

Mr. Erickson: I would like to comment for the record, even though the laughter doesn't appear, that my view is dictated some by the offers made for some tracts we have, so I say I know whereof I speak, there has been no tremendous increase. If a stipulation that there has been a substantial increase would be sufficient for the other side——

Court: Would that be sufficient for your purpose, a substantial increase?

Mr. Lamey: Well, we will see what we can do.

Court: Very well, proceed.

Q. Mr. Cox, you were familiar with the situation down there. Now, did I understand you to say there wasn't too much acreage that was available for sale within the units, is that correct? A. Correct.

Mr. Erickson: I would be willing to stipulate that I [471] would have no objection to this witness on the basis of his experience giving his opinion as to whether there has been an increase, and the rela-

(Testimony of Winston Cox.)

tive amount of increase. I would agree to that because I think he is qualified to say.

Mr. Johnson: Could we say from so much to so much?

Mr. Lamey: I think the witness can along the lines of the stipulation or suggestion of counsel.

Q. Mr. Cox, you just tell us in your own way what happened to values of lands along the Cedar Creek Anticline between a time prior to the discovery of the Pine and Little Beaver wells, and subsequent thereto?

A. Well, I might even say that \$430 that I paid for the state tract was not my top. I believe that then as now, if a person—we know the price was \$2.50 to start with. I believe then as now, if a person had a piece of acreage properly located, they could have gotten between three and five hundred dollars per acre for it.

Q. Would that pertain throughout the anticline pretty much?

A. Well, again, we would be in the dark what the companies would be willing to give for it. It might vary in a quarter of a mile, but I just know in two or three instances what companies were willing to let me pay for acreage. That is what I am basing that price on.

Mr. Lamey: That is all, you may cross examine.

Cross Examination

Q. (By Mr. Erickson): Mr. Cox, the property you acquired from the state, the last piece, the \$490 piece——

A. \$430 piece.

(Testimony of Winston Cox.)

Q. Whatever the figure is, is in 16, 11, 57, is that correct? A. Correct.

Q. It is a fact, is it not, that that land is within a mile of the discovery well in the Pine Unit?

A. No, it is five or six miles south.

Q. Had the well been drilled that appears on this map now, in Section 15, at the time you bid on that property?

A. No, there would have been no wells drilled in 11, 57.

Q. So, the discovery well was in the township north, is that correct? A. Correct.

Q. Now, with reference to these areas where you think you could have gotten from three to five hundred dollars if you had land available, could you still get that same price?

A. Yes, however, it depends entirely on what information the company has developed to this date. If that land was located on their hot spots, there is no question those kind of prices might prevail.

Q. Were they located on some hot spots?

A. I don't understand the question. [473]

Q. You testified, as I understood, you had in mind specific pieces of property, which if you had them available in particular areas, you could have gotten three to five hundred dollars for. Could you still get the same price for those same acreages in the same areas?

A. If drilling has not condemned it.

Q. Do you know whether drilling has condemned it?

(Testimony of Winston Cox.)

A. I had no particular tracts of land in mind. I am speaking of areas, not tracts of land.

Q. The areas where you could have gotten that price, where were they?

A. Immediately adjacent to the Cabin Creek discovery, and in the Pine area.

Q. Were any of those areas down in Unit 5?

A. I am not that familiar with Unit 5.

Q. Do you know of the drilling of the Stanolind well, I think it was completed last year, in Unit 4, which is the area below or just opposite it towards Cabin Creek in this approximate location (indicating), do you know the drilling of that well?

A. Yes.

Q. Do you know what the result of that drilling was?

A. Dry hole.

Q. Do you know of the recent completion of the McDonald well?

A. A dry hole. [474]

Q. That is in the same township and range, is it not?

A. I believe that is in the township north.

Q. Anyway, it is in the general area south of the Cabin Creek well?

A. It is east.

Q. Is it more east or south?

A. It is east.

Q. Now, with relation to the values of lands in the general area of these two dry wells, and based on your experience, in your opinion, would two dry wells have an effect upon the value of the leases of the properties adjacent thereto?

A. Very much so.

Q. What would that effect be?

(Testimony of Winston Cox.)

A. Well, as far as I personally am concerned, knowing a little about the area, I wouldn't probably pay anything for leases in there.

Q. Would it have any effect, the discovery or the drilling of these two dry holes, would that, as a result of your experience, have any effect on the values of lands in Unit No. 5, which starts about four miles south?

A. They definitely would after you get off the crest of the anticline. I think it has been established it is going to be long and narrow, and if you get east or west of the top of it, prices are going to definitely vary greatly.

Q. As a result of drilling those wells? [475]

A. Those and others like them.

Q. Look at the map, 1-A, and it has been established by some other witnesses that these closed circles are the crest of the anticline, is that your understanding?

A. I think that is correct.

Q. So that with relation to this map, you can see there are considerable acreages not included within closed circles, is that correct?

A. I think that would be correct.

Q. As a result of drilling the two wells to which we referred and which were off the top of the structure, what would you have to say as to the effect of the drillings on the value of lands in Unit 5 not on top of the structure?

A. They would be reduced in value.

Q. Do you have any idea now as to what the present value is of lands in Unit 5?

(Testimony of Winston Cox.)

A. What it would be to me and what it would be to someone with geological information would vary from \$5 to \$500 per acre. I have no geological information.

Q. You don't know of the present market value of lands in Unit 5, is that correct?

A. Well, if I were spending my own money, I know what I would be willing to pay for some of it, and I wouldn't be nearly as interested in others of it, but as I say, it would be a guess because of past performance on the anticline as far [476] as that is concerned.

Q. Would you be willing to pay as much now as you would have been a year ago?

A. For a piece or two of that, I would be willing to pay more.

Q. Would you be giving away any secrets if you indicated which pieces those were?

A. I don't know about this particular acreage, but I would want to be on top of the crest of the anticline.

Court: Does the fact that the lands are unitized have any effect upon their value?

Witness: Are you asking me?

Court: Yes.

A. Not to the companies holding leases, I don't believe. It would to me as a mineral purchaser or royalty purchaser, but I can see no reason for the company holding them why they would decrease in value.

(Testimony of Winston Cox.)

Q. Is that assuming the company holding the unitized area was the operator?

A. I don't believe I follow you.

Q. Well, suppose Unit 5 were held by Stanolind, for example, as the unit operator and it had the majority of the acreage, would that have reduced the value to Shell if they were——

Mr. Lamey: Would it be unitized for gas or oil?

Mr. Erickson: The question was suggested by his Honor. [477]

Mr. Lamey: I think the witness should be made aware if you are tying it into this case, it should be unitized for gas.

Q. Assume it was unitized for gas.

A. I don't see where it would affect it very well.

Mr. Erickson: Does that sufficiently answer it, your Honor?

Court: I suppose so, I don't know what I was finding out. I wanted to show I knew as little about it as a lot of other people.

Q. It is pretty hard to generalize as to the value of large blocks of land for leasing purposes, isn't that true?

A. That is true.

Q. There may be lands in one section worth several hundred dollars an acre, and other lands adjacent to them practically without value, isn't that correct?

A. For the people having the geological information, that is true.

Q. I believe you have testified insofar as Unit 5 is concerned, considering all lands in Unit 5, they

(Testimony of Winston Cox.)

would on the average be of considerably less value now than a year ago. Would that be a fair statement of your views?

A. No, in view of the Monoco discovery, for these people without information, it has probably more or less cancelled the information we thought we had gotten from the Stanolind [478] and McDonald wells.

Q. And the Monoco well is the well just to the east of Unit 5, is that correct?

A. No, it would be in 7 North.

Q. And it is 60 East?

A. No, 61, immediately across the line.

Q. It is a distance of some eight or nine miles from the nearest point in Unit 5, is that correct?

A. Probably so, yes.

Mr. Erickson: That is all.

Mr. Lamey: That is all.

(Witness excused.)

T. R. BARNES

called as witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Lamey): Will you state your name?

A. T. R. Barnes.

Q. And where do you live?

A. At various parts; I am on the New York staff of the Shell Company on special assignment,

Q. Have you lived in Billings?

(Testimony of T. R. Barnes.)

A. I lived about a little over five years in Billings. [479]

Q. What is your profession?

A. I am an engineer and geologist.

Q. And what is your title, if you have one, with Shell?

A. Well, at the present time I am classified as Senior Geologist.

Q. Do you hold some degrees in geology and mining?

A. I have a degree in Engineering from Stanford University in 1926, and a degree of Petroleum Engineer in 1928.

Q. After finishing the University, what did you do in the way of carrying on your profession?

A. Immediately after graduating and getting my advanced degree, I was instructor in Geology for one summer, and then I was geologist and engineer for Honolulu Oil Corporation until 1931, or 1931. From 1931 to 1935, I worked at various operations in the oil fields, the latter part of which was directional drilling and well surveying, and I went to work for the Shell Company in 1935 as a petroleum engineer.

Mr. Erickson: I would stipulate his qualifications, Mr. Lamey.

Q. And have you worked for the Shell Oil Company then since 1935?

A. I have, as a petroleum engineer and geologist.

(Testimony of T. R. Barnes.)

Q. What has been your experience in your profession in Montana?

A. I started studying Montana, and particularly as a part of [480] the Williston Basin in 1949.

Q. And during the course of that study, did you become acquainted with the Cedar Creek Anticline as shown on these U.S.G.S. maps, Exhibits 1 and 1-A?

A. I did, as to the surface and as to the sub-surface.

Q. Were you engaged in that study or some work for Shell in the Williston Basin when the Amerada well came in in May, 1951?

A. I did, I had prepared a special report for Shell Oil Company covering the Williston Basin.

Q. Will you state whether or not Shell Oil Company drilled a discovery well at Ritchie, which came in in July, 1951?

A. They did.

Q. Now, during 1950, did you have occasion to do some work in the Cedar Creek Anticline?

A. We did, we had very detailed studies made of the rock samples that were obtained from the N.P. No. 1, Carter well, Warren well, and Smith well, and we were conducting seismic operations along the Cedar Creek Anticline.

Q. When you refer to seismic operations, what do you have in mind?

A. In our seismic operations, we have a crew of men and equipment, the principle of which is to set off a charge of dynamite, and the sound therefrom is reflected down into the ground and it is re-

(Testimony of T. R. Barnes.)

flected back by various layers in the earth's [481] surface, and being reflected back, recordings are made of those.

Q. Yesterday, Mr. DeWolf referred to geophysical work. How does it relate, the two terms, geophysical and seismic?

A. Geophysical includes seismic work, geophysical being any of those studies pertaining to the earth, seismic being those that refer to sound in the earth's surface.

Q. Now, over what portion of the Cedar Creek Anticline did your seismic traverse during 1950?

A. It started at the north end, as shown on the maps, and extended through to the south end of the structure that is the Baker-Glendive or Cedar Creek Anticline.

Q. What have you to say as to whether or not that was an over all reconnaissance, a quick reconnaissance, or a detailed section by section seismic operation?

A. No, we started in at the north end on a reconnaissance program, that is, making sections as Mr. DeWolf has told they did down in the south end across the anticlinal structure at three to five miles apart, and the early part of 1950, one of these cross sections was approximately where the Pint Unit is. It indicated some possible closure, that is, an area in which oil might be accumulating. We then moved south and ran a seismic line across the anticline in what is known as Little Beaver area between the Carter and the N.P. well, the Husky and

(Testimony of T. R. Barnes.)

Smith well being very close thereto, and then [482] came back up along the anticline with various other lines across the structure, one of which was tied into the Warren well.

Q. Now, through Fidelity and M.D.U. and other sources, did you then have available some samples and cores and cuttings and log and electric surveys and so forth that had been taken from and made in the Smith, N.P. Carter, and those other wells that have been described here in the course of this testimony? A. We did.

Q. Now, in what way did you make use of that data from those wells in connection with your seismograph survey?

A. In the seismograph surveys, we got reflections from somewhere within the earth's surface. We may get a series of them that occur at a different time, that is, a different time interval in which they were received back. These may leave you somewhat in the dark as to their occurrence, that is, their depth, so that with the examination of the samples and logs of the wells which were previously drilled, having a very detailed knowledge of those points at which oil shows had been obtained, where the sands or limestones were porous, and having shot a line adjacent to them, we were able to reconcile our seismic picture along the rest of the anticline, so that we could predict within reasonable limits the locations of these possible reservoirs, beds and other localities along the axis of the anticline.

(Testimony of T. R. Barnes.)

Q. Did you also run a survey or a line in Unit 5? [483]

A. We did; there have been a number of them in that unit.

Q. And were you able to tie those findings in with what was available to you from the well known as the Warren well?

A. That's right, we not only could tie it in with the Warren well, but with the wells that were drilled, such as Carter and the N.P. No. 1 well.

Q. Did you also have available from the Warren well the same type of data as I previously referred to? A. Same type, yes, sir.

Q. With the two points of tie in between Unit 5, the Warren well, and the wells in Little Beaver, what were you able to get in the way of interpretations or conclusions?

Mr. Erickson: To which we are going to object on the grounds that the seismic maps are not here, and other information about which he seems to be testifying. They are obviously available, and for the purpose of cross examination, we should have an opportunity to challenge the validity of the showings made on the seismic maps, and without them being here, we can't do that.

Mr. Lamey: If we put the seismic maps in without testimony, none of us would understand them, I wouldn't understand them. I will say, counsel, I don't know whether they are available or not, but if they are, we will certainly get them for you.

(Testimony of T. R. Barnes.)

I am merely asking as to his findings, conclusions and opinions as a professional man. [484]

Court: Yes, I don't understand that it is a requirement that before his testimony is admissible that the maps or any written memorandum that he made at the time be introduced in evidence. If he testifies from them, then, of course, you are entitled to examine him.

Mr. Erickson: He is testifying from them because he says he has specific knowledge of geological characteristics of Unit 5, based upon a study of the seismic data contained in a report, certain maps or charts prepared for him. He is now testifying from those. We have no way to impeach the validity of his testimony without the seismic maps, we have no way to challenge the validity of his testimony, and we would object to his testimony until they are produced.

Court: Court will stand in recess until 3:15.

(10-minute recess.)

Court: Counsel, it would seem you are asking the witness to give his conclusions based upon reports that are not in evidence and are not available.

Mr. Lamey: I would like to have the question read, your Honor. May I have it?

Court: Yes.

(Question read back by Reporter.)

Court: Obviously, while the question itself doesn't call for it, obviously, from the testimony of the witness, he is testifying to his opinions and conclu-

(Testimony of T. R. Barnes.)

sions drawn from other [485] reports. They are not in evidence, and they should be available.

Mr. Lamey: Well, he would be drawing from logs of wells, cores, cuttings, seismograph or electric logs.

Court: Counsel is entitled to cross examine him upon those as to the validity of his conclusion from those logs and that sort of thing. You can't bring a witness in and say, "This is his conclusion," and we are stuck with it. Counsel is entitled to examine him upon that.

Mr. Lamey: I think a professional witness can give his opinion.

Court: You can give his opinion, but you have to make available to counsel the facts upon which he is basing his opinion; otherwise, how does he cross examine him. It may be that other expert witnesses would come to a different conclusion from the very same data. He is entitled to go into that.

Mr. Lamey: I don't follow that, your Honor. It would be a physical impossibility. I don't know how many loads it would take, it would fill the courtroom here, cores and cuttings out of wells. They would come from various places in the state.

Court: I think you could make arrangements for the proper examination of them. Because it is difficult doesn't make it admissible without them.

Mr. Lamey: We would have three inch cores, we would have [486] hundreds and hundreds of feet——

(Testimony of T. R. Barnes.)

Court: Counsel is entitled to have his expert examine them just as this expert.

Mr. Lamey: Does he have an expert?

Court: I don't know. We are not entitled to ask him at this point. If he makes objection, I think that is all that is necessary. How else is he going to cross examine this man with reference to his conclusions?

Mr. Lamey: If I had it, I would have someone and I would ask him about it. I wouldn't want to look at cores.

Court: It wouldn't do me any good, either, but he might have an expert.

Mr. Lamey: I would put the expert on the stand and have him give his opinions.

Court: I don't think he could do it unless he looked at these things.

Mr. Lamey: I would have him go down and make searches, whatever he could find to base his opinion on. He could read books, reports or anything else.

Court: Isn't it the same thing if a doctor comes in and interprets an X-ray, some other doctor can't get on and interpret the X-ray without examining it, he can't interpret the same X-ray without looking at it. You have to make that same X-ray available. If the opinions this witness is giving are based upon logs and reports and seismograph, whatever they are [487] called, then they have to be made available.

Mr. Lamey: That is what I have said. Take

(Testimony of T. R. Barnes.)

seismograph work, take it in here and it goes into evidence, then everyone else, Mr. Wight, everyone else interested in oil comes in and photostats it, and it makes it available to themselves for their information.

Court: That is what happens, and that is why some people settle cases, because they don't want to disclose certain facts. You are always faced with that proposition, not in just this case, but in every case, that you have to make disclosures you don't want to make, if you are in a lawsuit.

Mr. Lamey: I don't want to belabor the Court. I will go ahead and get whatever information other than that that I can, develop the facts and then endeavor to make an offer of proof.

Q. Now, Mr. Barnes, after completing your geophysical work, did you locate a well on the Pint unit? A. We did.

Q. About when was that well commenced, do you know? A. It was spudded in July 8, 1951.

Mr. Erickson: May I at this point, your Honor, having first learned definitely of the existence of the seismic data, and having learned from the witness Cox that the best evidence of value is to be found from a study of geological and seismic data, make a demand upon the defendants through this witness [488] to produce those various items on the matter of value?

Court: Well, I don't know whether your demand is of any effect as of this point. Counsel doesn't

(Testimony of T. R. Barnes.)

have to prepare or submit information to you as a result of their investigation and operations.

Mr. Erickson: I believe the rules—I am not going to press this point—but it does occur to me that under the rules when it is developed from their evidence that the best evidence of value is the seismic information, and it is in their files, and since it just came to our knowledge now, that we would be entitled to that information, and the opposing side would not be permitted to put in any other evidence other than the best evidence, which is available in their files. I may be entirely wrong on it, but it seems to me——

Mr. Lamey: He can't object to me putting it in and on the other hand demand I produce it.

Court: He is not objecting to you putting it in, he is objecting to you not putting it in.

Mr. Erickson: I am going to withdraw my demand. I haven't had a chance to study it out. We want to get this lawsuit finished, and I think so far as the matter of value is concerned, I wouldn't want to require the Court to make a ruling, or delay ruling for the purpose of arguing the validity of that proposition.

Court: Very well. [489]

Q. All right, to continue with the Pine well, when did you first get a show of oil in that well?

A. That was about October of 1951.

Q. And at what depth?

A. Somewhere between eight thousand, or about between 88 hundred and nine thousand feet.

(Testimony of T. R. Barnes.)

Q. Now, were you able to correlate the findings of the formations found in that well with the wells down in Little Beaver that had been previously drilled? A. We were.

Q. And were you also able to relate that to your surveys and geophysical survey?

A. With the information obtained from the rocks penetrated, we were able to tie that into the seismic surveys and into the same units that had been penetrated in these other wells to the south.

Q. Now, then, where did you locate the next well?

A. The next well was located in what we called the Little Beaver area, west of the N.P. and Carter wells which had been previously drilled.

Q. Why did you locate the well there?

A. Based upon our interpretation of the well data and our seismic information.

Q. By well data, you mean what?

A. The well logs and core samples and various tests that [490] had been made in these wells.

Mr. Erickson: At this time we move to strike the response to the last question because here again it is obvious there are logs available and various other information, and while the matter on which the witness is testifying is not particularly material, it is obvious we are being confronted again with the same situation.

Court: Yes, counsel, it seems to me you are asking him why did he locate a well there, and he said because he had available to me certain logs,

(Testimony of T. R. Barnes.)

cores, other reports and studies, whatever they are, and he studied those and made his conclusion. You are the one putting it in. If you want to put it in, you have got to make that available. What is the purpose of this testimony this witness is giving? What is the particular purpose?

Mr. Lamey: If permitted to go ahead, to show the relationship of one end of the field to the other and the over all structure in this anticline.

Court: I am anticipating he is going to say, "This is one structure." He is going to say, "I base that on this information that I got." Now, is it going to be a secret to him, is he the only one that is going to be able to testify here with reference to his conclusion from that information? Isn't the Court entitled to find out what that information is? You want me to believe him. You have got to make that evidence [491] upon which he bases his conclusion available so that other experts can come in and say, "No, Court, No, Judge, his conclusion is wrong, this is not one structure. These cores, these reports, this data all show this is three different structures, or two," or however many it is, you see. His conclusion is of no value to me unless it can be put to the test of cross examination.

Mr. Lamey: I have tried to explain it is impossible to bring it into court. It would be a physical impossibility in the first place.

Court: It may be. We don't have to bring it into Court. It could be brought some place where counsel with an expert can have an opportunity to

(Testimony of T. R. Barnes.)

examine it. All you have to do is say that is what you will do, and counsel will have an opportunity to look at the reports. He may not question the matter after he has examined it. It is the same thing as I mentioned before, an X-ray. A doctor gets on the stand and tells me an X-ray shows there was a broken bone. There is no way in the world that you can cross examine that doctor unless the X-ray is available.

Mr. Lamey: I think in your situation if the doctor came in, could he not say, "I have examined this. I think there was a broken bone."

Court: Yes.

Mr. Lamey: All right. He is cross examined, and they [492] want to get the X-ray subpoenaed quick——

Court: The doctor can come in and say there was a broken bone. If he comes in and says, "There is a broken bone because I looked at an X-ray of it." You would bring the X-ray in and look at it. He can't say there was a broken bone because an X-ray discloses it without giving us an opportunity to see the X-ray.

Mr. Johnson: May I say one thing? It is my understanding this evidence is not offered for the purpose of showing that a particular spot in this anticline is productive or not productive of oil. We are merely trying to show how a geologist, such as this man, utilizes information which is available to him from wells. We are not trying to say what the particular results are, but only describe the method.

(Testimony of T. R. Barnes.)

Court: We are not interested in the method particularly except as it supports his conclusion that this is one structure. Then when you describe that method, you are asking him a particular fact, a conclusion of his as a result of his investigations, his on the spot examination and other data and information. Now, you have already had some witnesses testify this is one structure, but they were not claiming they were basing their opinion on the same thing that this witness claims he is basing his opinion on. If this witness said, "I went out and walked over and examined the property and in my opinion, it is one structure," it would be fine, it is all [493] there is to it, but the minute he says he bases it on information from these logs, then in order to give the Court information, in order to protect the opposing party, those logs should be made available. How else can counsel cross examine this witness as to the validity of his conclusion?

Mr. Lamey: I would be prepared to cross examine any witness that he would put on here with reference to say, a contrary opinion, without logs or anything else.

Court: I don't see how you could.

Mr. Lamey: I would come into Court prepared to do that; I am prepared to do it if he puts one on, and it wouldn't help me at all to see a core.

Court: It wouldn't help you, but it would help your expert who would advise you.

Mr. Lamey: I am talking about him putting his

(Testimony of T. R. Barnes.)

expert on and how I could examine him. As I say, having a core wouldn't help me.

Court: If this witness, Mr. Lamey, draws a conclusion from that core, no one can tell whether his conclusion is valid or not unless they can see that core too and examine it.

Mr. Lamey: Your Honor, what you are doing is actually making a physical impossibility—when ever a man goes out here, a geologist, if he has to make his source available. He goes to the Black Hills and picks up a rock and makes an examination [494] of it and can find the same outcropping in a well 2,000 feet deep. If he testifies to that relationship, he must bring the rock from the Black Hills with a piece of the core down 2,000 feet. We come into Court with that. He goes to the records in Helena of the logs of wells and looks those over. I must get somebody from the Conservation Board with all those. If the N.P. had a core of well in its St. Paul office, I must get all the cores because he looked at them, and on and on, a two or four year study. No geologist could come in under the rule laid down by the Court and actually give his opinion.

Court: Yes, I think he can.

Mr. Lamey: Not if he seen anything or made an investigation. If he walked over the top of this, that kind of an opinion would be no good. He could walk over it, and everyone would laugh at him if he walked through the Cedar Creek Anticline and said it is one structure. In these days, he

(Testimony of T. R. Barnes.)

must have these modern methods. That is the effect of this ruling, and really, I don't think it can be done. Another thing, Mr. DeWolf testified here. He gave his opinion. He had a seismograph, of course. It was finally put in on their insistence. It just shows where the lines were shot.

Court: The objection wasn't made at that point, I don't believe.

Mr. Lamey: We are in the situation now where no geologist [495] in the State of Montana can give an opinion.

Mr. Erickson: In DeWolf's testimony, the major portion of it was available from the map; he testified primarily from the map, and we were in the position where we could decide whether we wanted to object or didn't want to object. He didn't deal so specifically with particular wells. Of course, the Court has, by the statements made by the Court, they include all of our position on it, and we believe that analogy between this situation and the X-ray is perfect and complete, and if opposing counsel wants to use a witness like this, they just run up against the problem where they have to make the choice whether they want to do it or not. I am agreeable to going any place and looking at those things. Of course, I don't believe it does me any good to look at a core, but it does Mr. Barnes. We would have our experts, too, available, who would go and look at it, and then we would have some basis for drawing a conclusion. I don't believe the picture Mr. Lamey paints is exactly cor-

(Testimony of T. R. Barnes.)

rect. I believe a geologist can give an expert opinion under proper circumstances, but can't do it, in my opinion, by bringing in a specific well and saying, "I looked at the log of the well and I saw that seismic picture," and then go ahead and give his opinion without those being available.

Court: That is my opinion, and I am going to sustain the objection to it. You are in the same position as Judge Erickson [496] is on another point in the case. You can brief it later. If I am wrong, I will reopen it for you. For your purpose, I don't see how I can permit the testimony at this time.

Mr. Lamey: I take it under the rules, rather than make an offer of proof, the procedure would be to go ahead with the questioning, subject to the objection, so as to complete the record.

Court: I am not going to do that because I don't think it is admissible. We are going to open up a whole different picture, and the only thing I can suggest to you is brief the question in your brief and if I find I am in error, I will reopen the matter for you to put that kind of evidence in.

Mr. Lamey: Your Honor, as a matter of procedure——

Court: At this point, you will have to drop it.

Mr. Lamey: My question is whether an offer of proof should be made, or just go ahead, as I take it, under the Federal rules, and have the record made in question and answer form. I can do it on an offer of proof if the Court prefers. I have the

(Testimony of T. R. Barnes.)

rules available here, and that is why I was asking.

Court: Do you have an offer of proof prepared?

Mr. Lamey: Pardon.

Court: You say you have an offer of proof prepared?

Mr. Lamey: No, I have no offer of proof prepared, but as I say, under the rules, you can go ahead with the Court's permission, and ask the questions, subject to the objection, [497] with this understanding: I will go ahead, and when I get through asking questions such as I don't think conflict with the Court's ruling, and when I get through, I will make an offer of proof.

Court: You can go ahead that way.

Mr. Erickson: I am not sure I understand.

Mr. Lamey: What I have in mind is Rule 43, subdivision (c), Record of Excluded Evidence. The first part of it deals with jury trials. The last part says, "In actions tried without a jury, the same procedure may be followed, except that the Court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged." I realize, of course, that the Court has taken the view it is not admissible. Then, I assume, I will have to make an offer of proof.

Court: You don't so far as I can see. The question has been raised, I have ruled on it, and that is in the record. Now, the only thing you have to do so far as I am concerned is argue the matter in a brief, and I will reverse myself if I find I am

(Testimony of T. R. Barnes.)

in error. For an appeal, don't you think the question is already in the record? What I have done is excluded testimony of this witness' conclusion based upon information that is not made available.

Mr. Lamey: I want to put into the record what he would [498] testify to.

Court: Very well, then, make a statement of it.

Mr. Lamey: I will go ahead and get things outside of it if I can and then come back to it. Let me see, I believe--was it Little Beaver, the last question?

(Question read back by Reporter.)

Q. Where was the next development by Shell, or the next drilling let us say, on the Cedar Creek Anticline following Little Beaver?

A. You mean as an exploration well?

Q. Yes.

A. The next well was in the Cabin Creek area.

Q. Is that identified on the map, Exhibit 1?

A. That is this Cabin Creek Unit, as shown on the map (indicating).

Q. Now, since the discovery in Pine, will you describe in a general way what has been the overall activity of the defendant Shell Oil Company on the Cedar Creek Anticline in the way of drilling and exploration?

A. That is in our development program, and after an exploratory well is drilled, the next step is to step out, shall we say, quite rapidly. For instance, in the Pine Unit, we drilled wells both east and west of the discovery, and then started out

(Testimony of T. R. Barnes.)

along the axis to the south, drilling these out-stepping wells, that is, wells a mile or a mile and a half from adjacent [499] production, in order to define the limits of these productive areas as rapidly as possible. The same was done in the Cabin Creek area, and likewise in Little Beaver. We drilled several wells to the northwest, and recently to the north of the discovery wells, that is, the discovery of commercial production, and we located several other wildcat wells, one of which was drilled as shown in the Coral Creek Unit, which is essentially Unit 7. Other recommendations to drill were likewise made, some of which we were unable to complete due to——

Mr. Erickson: Just a minute, I am going to object because the witness is obviously volunteering, and it is not responsive to the question.

Mr. Lamey: Very well, I will put another question.

Q. You drilled a well on Coral Creek?

A. Yes.

Q. What was the outcome of that well?

A. That well was a dry hole.

Q. And what is the most northerly well that Shell has drilled from the Little Beaver area toward Unit 5?

Mr. Erickson: May I have the question?

(Question read back by Reporter.)

A. That was the Coral Creek, which was drilled in 1954.

Q. And now going to the Pine well, what is the

(Testimony of T. R. Barnes.)

most southerly well from the Pine and in the direction of Unit 5 that Shell has drilled? [500]

A. That would be in the south end of the Cabin Creek Unit.

Q. What has been the extent of activity since the discovery of Pine, as you may describe it by the number of rigs you have kept actively engaged in the Cedar Creek Anticline?

A. Including our exploratory and development efforts, it has never been less than two, and there has been as high as 10.

Q. Has there been any drilling in Unit 5?

A. No, there has not.

Q. Have you approved a location, or have you approved drilling in Unit 5?

Mr. Erickson: To which we object on the grounds it is incompetent, irrelevant and immaterial.

Court: Sustained.

Q. Prior to the commencement of this action, had you recommended drilling in Unit 5?

Mr. Erickson: To which we make the same objection. I can't see the relevancy or materiality of any recommendation made for drilling.

Court: Sustained.

Q. Now, what amount did the Shell Company spend during—strike that out. Do you know the cost of the seismic work and its geophysical work on the Cedar Creek Anticline during the years 1950, 1951 and 1952?

Mr. Erickson: To which we object on the grounds it is [501] immaterial and irrelevant.

(Testimony of T. R. Barnes.)

Court: What is the question, Mr. Parker?

(Question read back by Reporter.)

Court: Overruled.

A. Approximately \$725,000 for the field operations alone.

Q. And do you know the cost of similar work in the years 1953 and 1954?

Mr. Erickson: We will make objection because that is too remote and after the action was filed, again being irrelevant and immaterial.

Court: Overruled.

A. Approximately \$600,000.

Q. When your company went into the Cedar Creek Anticline on its seismic work, was it of value that all of the lands, or a large portion of the lands were blocked up under the Fidelity operating and other agreements?

Mr. Erickson: To which we will object on the grounds it is immaterial, irrelevant and outside the issues of the case, and no foundation.

Court: I will have to ask you to repeat the question.

(Question read back by Reporter.)

Mr. Erickson: My objection would be, your Honor, it is irrelevant and immaterial and isn't illustrative of any issue in this case. There is no pleading that would raise the matter. [502]

Court: What is the purpose?

Mr. Lamey: This Fidelity operating agreement refers to the whole Cedar Creek Anticline. I want to put in in what way it allowed his company to

(Testimony of T. R. Barnes.)

go ahead speedily with examination and development.

Court: Under the agreement?

Mr. Lamey: Yes.

Court: That is for the Court to determine, not for Shell, what could be done or couldn't be done under that agreement. That is going to be a matter for the Court to determine, isn't it?

Mr. Lamey: Yes, under the agreement what could be done. But the fact is from an exploration standpoint, it, of course, put this whole unit together in one block.

Mr. Erickson: We are contending as to Unit 5 and our lands, we are contending they weren't covered by any Fidelity operating agreement, and the Court will have to make the determination as to whether there was one. I don't believe there is any foundation for the answer.

Court: I will reserve ruling on it. Put it in.

A. It was, very much, to us.

Q. In what way?

A. In our exploration program, we must acquire lands prior to very expensive exploration such as our seismic efforts, so that when we find what we call a drillable location, we have [503] control of those lands, and if we have to pick them up 40 acres by 40 acres, a greater time is consumed than if we are able to acquire them as we did in these unit agreements, many thousands of acres. Our program was able to expand very rapidly and cover the area.

(Testimony of T. R. Barnes.)

Mr. Erickson: We are going to make objection and move to strike the answer.

Court: All he is saying is Shell thought they were dealing with the right people, isn't that what he is saying?

Mr. Lamey: I think they have a right to say that when this agreement is on record, a recorded document, unreleased.

Court: Yes, if it was a question of good faith or bad faith. I don't think it is here.

Mr. Lamey: We have estoppel and laches in here, whether they can sit by and allow these on record. The evidence is they never asked for a release. They are on record. Someone goes in and they are all blocked up. Certainly, he has a right to rely on that.

Court: Of course, it was important for them to deal with the right people.

Mr. Lamey: If they made a mistake, that is what the Court is going to determine.

Mr. Erickson: In view of the argument made by counsel, this witness assumed, from his answer, they had acquired the rights. He was, therefore, usurping the power of the Court [504] in this matter, and while this is not the proper place for arguments of the case, we point out that relying on the records themselves——

Court: Insofar as the question or answer may impinge upon the responsibility of the Court, the Court won't consider it, but to illustrate the point counsel offers it for, it is admitted. In other words,

(Testimony of T. R. Barnes.)

when they go into this kind of an operation, they must control the acreage. That is the point.

Mr. Lamey: Now, may it please the Court, at this time, we offer to prove by the witness now on the stand that, if he had been permitted to testify, that he would testify that having available to him information with reference to the wells in Little Beaver and Warren, and having had seismic surveys made through the Cedar Creek Anticline, and particularly with his survey between the N. P. well and the Carter well, and a survey at the Warren well, that he was in a position to better interpret his geophysical survey, and that as a result of that, he was able to conclude the various depths at which reflecting horizons might be found and tie those in definitely between the Warren well in Unit 5, and the wells in the Little Beaver area. I think I will make my offer of proof up, if I may, and if the Court will rule, I will make a further offer for the reason I think there might be a little different situation with reference to the sections of the offer of proof.

Court: What is the purpose of this first offer then, [505] what is the purpose of that testimony? You say he was able to reach a better conclusion?

Mr. Lamey: Yes, and it shows a tie in between the wells theretofore drilled in the Little Beaver area and the Warren area.

Court: In other words, really, what it is is that it is all one structure, is that it?

Mr. Lamey: I will come to that eventually.

(Testimony of T. R. Barnes.)

Court: I just don't understand the purpose of this offer.

Mr. Erickson: If the purpose of this offer is to establish by an examination of this data there is a definite tie in between all of those wells that would tend to indicate a similarity of structure, I would object to the offer of proof.

Court: Is that the purpose? That is as I understand it.

Mr. Lamey: It is so intended, yes, sir.

Court: On the basis of the discussion already had, I will sustain the objection.

Mr. Lamey: I further offer to prove by the witness, if permitted to testify, he would testify that after drilling the well in Pine, the discovery well, that he was then able to tie in the location of formations in the Pine area with those in Unit 5 and in Little Beaver, tie them in and interpret them as a result of the drilling that had been done in those areas, plus his geophysical survey, and that they definitely showed [506] a similar trend and location of formations below the surface.

Mr. Erickson: Same objection.

Court: Yes, and the Court will rule the same and sustain the objection, it appearing that the offer requires a conclusion of the witness based upon data that is not made available to the Court and counsel.

Mr. Lamey: May it please the Court, we further offer to prove by the witness on the stand, that as a result of his work, study and investigation of the

(Testimony of T. R. Barnes.)

Cedar Creek Anticline, that it was his conclusion and opinion that the area from the Pine to the Little Beaver unit was one large geological structural unit.

Court: As I understand it, the conclusion that he would testify to is also based on this other data of other wells?

Mr. Lamey: Based on the data, and his study of the Williston Basin.

Court: Partly upon data not available here, is that right?

Mr. Lamey: Partly, yes, but not entirely.

Court: Very well, the Court will sustain the objection.

Mr. Lamey: And may I state for the record that in the opinion of the counsel for the defendants, it would be a physical impossibility to bring into Court the various maps, logs, cuttings, rock studies and other data that this witness examined throughout Montana and elsewhere in forming his [507] conclusion.

Court: The maps and logs that he examined, particularly with reference to those on the structure here involved, are the important things. Of course, part of his opinion, counsel, no doubt, is based upon some experience he may have had in Texas 20 years ago, and that, of course, is not what we are concerned with here, but obviously when you tie the matter so close as to logs of other wells drilled in the same area to base his conclusion that the wells are all drilled in one structure, those are

(Testimony of T. R. Barnes.)

matters that must be made available, and the Court excludes the evidence at this point.

Mr. Lamey: Your Honor, as I understand, bringing in the logs and geophysical surveys wouldn't cover the objection or the Court's ruling.

Court: Yes, I think probably it would, because he hasn't testified, as far as I recall, he hasn't testified that he himself studied cores or anything else, but if he did, and those cores are available, they should be made available.

Mr. Erickson: So there be no doubt on it, on the matter of impossibility, we would waive any demand that we look at the cores, but also as to the matter of impossibility, while it may be difficult for us as well as opposing counsel, I can assure counsel if those maps are made available in Shell's office here, Casper, Denver, or wherever they may be, we would be able to accommodate ourselves so we could come and look at [508] them there.

Court: As I say, obviously we are not going to fill the courtroom with cores or anything else like that, but the thing is, the maps and the logs should be made available to the Court and counsel for examination in order to test the validity of the conclusions offered. Now, on that point, as I mentioned before, you will, of course, and I would appreciate a brief on the matter, because if I am in error, it will be an easy enough matter to reopen the matter and let you put that evidence in, if I am in error.

Mr. Lamey: You may cross examine.

(Testimony of T. R. Barnes.)

Court: Let's take a short recess now until quarter after four.

(10-minute recess.)

Cross Examination

Q. (By Mr. Erickson): I don't believe the record shows, Mr. Barnes, the location of the Coral Creek well. I have examined the map, Exhibit 1-A, and I find a legend there on Section 22, Township 6 North, 60, which says "Shell Coral Creek, 33-22." Is that the location of it?

A. That is the well I refer to.

Q. Calling your attention to the location of that well, it is adjacent to certain lines here, which I understand to be [509] contour lines, is that correct?

A. Correct.

Q. And it is a matter of some 12 miles or so below the Cedar Creek?

A. About nine and a half from the edge of Unit 5.

Q. And, of course, the map speaks for itself. Has Fidelity Gas paid you any part of the cost of these seismic work and surveys on the Cedar Creek Anticline?

A. That I am not qualified to testify to.

Q. And you wouldn't know any more about whether they paid any part of the drilling costs?

A. No, I would not.

Q. Shell has drilled no wells in Unit 6, I think you testified, saying that the Coral well was the closest one from the south, is that correct?

A. That's right.

(Testimony of T. R. Barnes.)

Q. That is with relation to Unit 5. And there is, I believe, according to the map, Exhibit 1, at least one Shell well on the extreme northerly edge of Unit 4, is that correct?

A. That is still within Unit 3, just adjacent to the boundary of Unit 4.

Mr. Erickson: That is all I have.

Mr. Lamey: No further examination.

(Witness excused.) [510]

E. G. CHRISTIANSON

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Lamey): Please state your name?

A. E. G. Christianson.

Q. Where do you live?

A. Denver, Colorado.

Q. What is your business or profession?

A. I am employed by Shell Oil Company. I am Chief Exploitation-Engineer for the Denver area.

Q. Are you a geologist by education?

A. I am an engineer, a Bachelor of Science in Mining Engineering.

Q. From what college or university did you receive your degree?

A. University of Wisconsin.

Q. When was that?

A. In June of 1937.

Q. And have you since worked in the field of your profession?

(Testimony of E. G. Christianson.)

A. I joined Shell Oil Company in March, 1938, as exploitation engineer, and have subsequently worked for Shell Oil Company in that capacity through various different posts in Texas, Louisiana, and through various different Shell operations. [511]

Q. Are you familiar with the Cedar Creek Anticline area shown on Exhibits 1 and 1-A?

A. Yes, I am, that is under the Denver area supervision.

Q. Will you now explain to us a little more in detail just what your department does in connection with the development and operation in this Cedar Creek area?

A. Well, the actual drilling operations are conducted under the Production Department supervision, and the engineering applications are under the group of engineers under my supervision. The development work following the establishment of production in these various different spots on the anticline is supervised by Shell's Production Department.

Q. Are you in charge of that department?

A. No, I am in charge of the Engineering Section.

Q. What is the relationship of that position——

A. As a staff member to the Production Manager.

Q. When a well is started by Shell, where do you pick up?

A. After the, I mean after the establishment of production in an area, the supervision of the land

(Testimony of E. G. Christianson.)

passes to the Production Department, and plans for development of that acreage emanate from the Production Department. Our Engineering staff prepares a program of development.

Q. And do you have available to you the various records with reference to the wells that have been drilled in the Cedar [512] Creek Anticline by Shell?

A. Yes, I do, I have prepared a tabulation from Shell's official company records which shows the chronological order of development to March 31, 1955, of all wells drilled by Shell, either as operator of units, or by Shell for their 100 percent account.

Q. Now, were those the same wells that are shown on the map Exhibits 1 and 1-A?

A. Essentially that, except in the tabulation there also will appear groups of wells that operations have been conducted on beyond the time at which this map was concluded, to bring up the development subsequent to the preparation of the map, to the March 31st completion of this report.

Q. Does this tabulation bring your drilling and development activities up to date on the Cedar Creek Anticline?

A. Yes, to March 31, 1955.

Q. As I understand, you have shown certain wells, starting with 44, which do not appear on the map in evidence, Exhibits 1 and 1-A, is that correct?

A. Correct.

Q. In your tabulation, have you given the exact location of each well?

A. Yes, we have.

Q. Also the date of commencement and date of

(Testimony of E. G. Christianson.)

completion? A. Yes, sir. [513]

Q. Total depth? A. Yes, sir.

Q. And the total cost?

A. Yes, sir. In those cases of the wells that have not been completed, we have included in the tabulation our estimated cost of the entire job of drilling and completing that well.

Q. Does that tabulation also give information with reference to initial potential oil flow?

A. Yes, sir.

Q. And what else with reference to the well?

A. It also shows the percent water cut of the initial completion; it shows the formation from which the well is completed, the intervals below the surface in which the well is producing, and contains additional remarks as to the method of completion.

Q. In a few instances, I notice a legend "D and A". What does that mean?

A. In the abbreviations also appended at the bottom, that is explained. The "D and A" is an abbreviation meaning drilled and abandoned.

Q. By abandoning a well, you mean what?

A. We mean the well was incapable of production commercially and was abandoned.

Mr. Erickson: If this is going to be offered as an exhibit, I have an objection merely as to its materiality and [514] relevancy to the issues of the case, but as to the form and accuracy of the figures reflected, I have no objection.

Court: Very well, mark it, and the objection is overruled. What is the number?

(Testimony of E. G. Christianson.)

Clerk: Exhibit 60.

(Defendants' Exhibit 60 admitted in evidence.)

Q. I think, Mr. Christianson, you showed that the total number of wells drilled, 53, is that correct?

A. Yes, as of March 31st.

Q. That had been drilled or drilling?

A. Drilled or drilling. Looking back up the line there, 44 wells had been completed, nine were in the process of either completing or drilling.

Q. Now, from the time of the discovery by Shell in the Pine well in 1952, what have you to say as to the transportation situation of the crude oil?

Mr. Erickson: I am going to object because I don't believe it is material or relevant.

Court: As of what time?

Mr. Lamey: The discovery of the Shell well, immediately after that.

Court: And what is the purpose, counsel?

Mr. Lamey: I want to develop the economic situation and the necessity of developing the whole area in the development program. [515]

Mr. Erickson: If it please your Honor, I can't see how that would be relevant or material in this case that they thought it would be desirable to have a large area of land, as to whether Fidelity Gas complied with the terms of the contract or the contract terminated, or on the matter of estoppel.

Mr. Lamey: Maybe I can develop it another way.

Q. What does it cost to ship a barrel of oil out

(Testimony of E. G. Christianson.)

of the Cedar Creek Anticline to either a pipe line or some place where it is finally purchased?

Mr. Erickson: I am going to make the same objection. I may say, counsel, I have no desire to delay the matter, because we are all hoping to be through, but I just don't see the relevancy or materiality of it.

Mr. Lamey: All right, we will withdraw it. You may cross examine.

Cross Examination

Q. (By Mr. Erickson): The Exhibit 60 shows the depths of the wells, does it, Mr. Christianson?

A. Yes, sir, it shows the total depth to which they were drilled.

Q. By referring to Item 22, Coral Creek Unit, and I believe that is the only well drilled in the Coral Creek Unit, it shows a depth of 9190 feet, is that correct? [516] A. Yes, sir.

Q. And it shows "Drilled and Abandoned", but it doesn't seem to have anything to indicate what formation was reached. Can you tell us why that wouldn't be there?

A. Actually these formations have reference to the producing wells, to the producing interval.

Q. So you can't say from looking at this exhibit whether the Ordovician was reached in the Coral Creek well, is that correct?

A. You cannot say it in this exhibit, but I can tell you.

Q. Tell us, please?

(Testimony of E. G. Christianson.)

A. The well was drilled to the Red River Ordovician.

Q. The map indicates, that exhibit, the exhibit indicates that except as to some wells, particularly in the north, the producing zone generally is the Ordovician, is that correct?

A. Yes, generally.

Q. This Exhibit 60 doesn't show any income you may have received from the sale of oil, does it?

A. No, sir.

Q. It reflects only expenditures?

A. Yes, sir.

Q. Can you say from having prepared the exhibit whether or not Fidelity Gas has reimbursed Shell for any of the expenses here?

A. No, sir, I cannot tell you from that. [517]

Q. Do you know?

A. No, sir, I don't know.

Mr. Erickson: That is all.

Redirect Examination

Q. (By Mr. Lamey): Mr. Christianson, on your showing of total costs——

A. Yes, sir.

Q. ——do you have reference there to anything more than the cost of drilling the well and connecting it up to the pumps?

A. Yes, sir.

Q. Tell us what that includes?

A. There are also included expenses shown as operating there, maintenance expenses, which include surface equipment repairs and well repairs, which are occasioned as the wells are unable to con-

(Testimony of E. G. Christianson.)

tinue to produce; there are also shown costs of field improvements, broken up into equipment, gathering lines, and roads. In our operations, it is, of course, essential that roads be established to the drilling sites, and beyond that, we have constructed roads from Glendive out toward the operations in a southerly direction. Similarly, the gathering lines represent a pipe line that has been constructed to connect our production in Cabin Creek to the production in Pine, and an extension then to a railroad siding at Colgate.

Mr. Lamey: That is all.

(Witness excused.) [518]

Mr. Lamey: That is all, your Honor, the defendants will rest.

Court: Very well.

Mr. Erickson: Call John Wight. We have just a couple questions on rebuttal.

JOHN WIGHT

recalled as a witness on behalf of plaintiffs, having previously been sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Mr. Wight, on your direct examination, you testified that you went in to see Cecil Smith and Mr. Heskett at their offices in Minneapolis sometime in April of 1938, is that correct? A. That's right.

Q. And you produced a check, which is an exhibit, being dated April 8, 1938, payable to the Hotel Nicollet, the Exhibit being No. 23. Since the

(Testimony of John Wight.)

time when Mr. Cecil Smith testified here that you had not been in his office during the early part of 1938, have you checked your files to see whether there might be other material in those files that would tend to refresh your recollection further as to your visit in the office? A. I have. [519]

Q. What did you find?

A. I found a letter from——

Q. On the letterhead of Montana-Dakota Utilities Company?

A. From Montana-Dakota Utilities Company.

Q. And the letter apparently bears the signature of Alger Syme, is that right?

A. That's right.

Q. Proposed Exhibit 61 is a letter on the letterhead of Montana-Dakota Utilities dated April 15, 1938, addressed to you. Taking a look at that letter, what is there in that letter that serves to further refresh your recollection as to your meeting with these gentlemen in April, 1938?

A. This letter is in answer to a previous letter I had written to Mr. Syme where he said he was expecting me to the office as soon as I returned to Chicago, and after I had returned from Chicago in the first part of April or last part of March, I would stop in the office. I recall that very definitely.

Mr. Erickson: Offer Exhibit 61.

Mr. Lamey: No objection.

Court: Admitted.

(Plaintiffs' Exhibit 61 admitted in evidence.)

Q. Mr. Wight, you heard the testimony of Mr.

(Testimony of John Wight.)

Cecil Smith that he had no conversations with you during 1937 and 1938 or at any time concerning the abandoning of the Warren well, or [520] concerning any statements supposed to have been made by him as to the intention of Fidelity Gas and Montana-Dakota Utilities to cease and abandon operations. Having heard that testimony, is your testimony the same as it was on the direct examination as to those conversations?

A. Absolutely, positively the same.

Mr. Erickson: That is all.

Cross Examination

Q. (By Mr. Lamey): Mr. Wight, you have referred to Exhibit 61, being a letter from Alger R. Syme, Attorney, on the letterhead of Montana-Dakota Utilities Company, dated February 15, 1938, directed to you in Whittier, California. What way did you say this refreshes your memory that you were in Minneapolis on some day?

A. Because I remember after reading that letter, it helped refresh my memory that I was in Minneapolis, and I told Mr. Syme I would be in Minneapolis as soon as I returned from Chicago, and I remember after reading that letter, that refreshed my memory, made me positive I was there as I testified, in the last of March or first of April.

Q. As I read the letter, "On January 25 you wrote me stating that you expected to be in Chicago for a few days, and upon your return would see me in Minneapolis in connection with the [521] certi-

(Testimony of John Wight.)

fied copy of minutes of Directors' Meeting of Midwest Holding Company authorizing the Bowdoin Unit agreements. As I have not heard of your calling at the office, I am wondering whether you made the trip or still expect to make it." You say that reminds you you were in Minneapolis on what date?

A. The last part of March or first part of April.

Q. Then, you connect that up with the check given to the Nicollet Hotel on April 8, 1938, is that the way you refresh your memory?

A. That's right.

Mr. Lamey: No further cross examination.

(Witness excused.)

THOMAS A. JIRIK

recalled as a witness on behalf of plaintiffs, having previously been sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Mr. Jirik, you heard Cecil Smith's testimony in which he denied that the conversations you related with him in his office in 1937 and 1938 ever occurred, and he also testified that in the visit made to his office by you in the company of Mr. Seivers, there was no such conversation as that which you testified to on direct. Having heard his testimony, would your testimony now be the same as it was on direct in spite of his [522] statements? A. Yes, sir.

Q. As to the conversations he testified to concerning the Husky, do you recall ever having any

(Testimony of Thomas A. Jirik.)

discussions with Mr. Smith concerning drilling of the Husky well? A. Not Husky.

Q. Was there any conversation concerning Husky?

A. No, not to my memory; Carter.

Q. You did discuss Carter with him, is that correct? A. Yes.

Q. At the time you had the discussions concerning Carter, was there any discussion concerning any interest Fidelity might have in the Carter well?

A. Not to my knowledge.

Mr. Erickson: That is all.

Mr. Lamey: No further cross examination.

(Witness excused.)

Mr. Erickson: That is all for the plaintiffs.

Court: Well, I think each side has one point, or at least one point on evidence to discuss seriously with the Court, and it may be you would want to argue those points, submit briefs on those points before you file your briefs in the case itself. What do you think? That is with reference, for example, to this question on whether or not an expert can testify without disclosing the basis upon which he testifies. In other words, [523] that is as I understand the situation, that you wanted your witness to testify as to a conclusion based upon certain reports that he read and that were available to him without disclosing what was in those reports.

Mr. Lamey: Upon that I am perfectly willing to disclose. I think the record here said to bring the reports and everything into Court, but the point

the Court is inquiring about, I think, is did we want to brief just those questions. I think Mr. Erickson——

Court: Maybe we can settle this other question. Of course, reference was made to bringing them into Court. In the first instance that may not be necessary. You may have your witness testify in the first instance without actually having them here so long as it is understood he will disclose what he is basing it on. In other words, a witness says, "I am offering my opinion upon a report." Now, it seemed to me obvious you did not want to disclose what was in the report he was basing his opinion on.

Mr. Lamey: Not a report, your Honor. Mr. De Wolf made one report. He had a lot of background before he ever said to his company, "Drill a well in the Pine Unit." I never even inquired whether that was written or not. But to get to the point, your Honor, which I think the Court began making inquiry about, whether we would like to brief just that subject on our part, and Mr. Erickson brief his, and the Court would probably [524] have in mind if the Court changes his mind on any feature of it, we could go ahead and get that straightened up, and we are perfectly willing to do that any way.

Mr. Erickson: It makes no difference to us either way. The only thing I would like to make very clear, if it isn't already in the record, I wouldn't like this matter to go off on the suggestion made by counsel that the Court's ruling was they couldn't put in the evidence unless they agreed to

bring the material in Court. We are not asking that. What we think the Court was saying is unless you are willing to make it available to the plaintiffs some place, he won't allow the witness to testify. I wouldn't want the ruling to go off on the basis that it had to be presented into Court.

Mr. Lamey: How do we make it available without bringing it into Court?

Court: He can go with you as far as that is concerned.

Mr. Lamey: Could we keep the case open until he went around and followed Barnes trail?

Court: Yes, indeed. It is just the same as examining the site of land. You are not going to bring that in here, but you can go out and look at it. It doesn't have to be brought into the courtroom in order to make it available, but over and above that, my understanding was that you didn't want to disclose the contents of the report. Now, is that so?

Mr. Lamey: There is no report. [525]

Court: I mean geophysical data or whatever you call it, old logs of wells. My understanding was you didn't want to disclose that.

Mr. Lamey: As to that, we wouldn't want to disclose, and I don't know, I would have to see it and examine it, but I think there might be some question of whether we would want to come into Court and make available to Mr. Wight and his mimeograph and everything a million and some dollars worth of work.

Court: I can appreciate that; I can appreciate the problem you have. That is the main basis of my

ruling here. It seemed to me obvious you did not want to make that disclosure, so there would be no basis upon which counsel could cross examine. The witness comes in and says, "Yes, I examined a number of reports, I examined the land, and so forth and so on, and my conclusion is so and so." The cross examination commences, "What reports did you examine?" "Well, I examined logs of well number 1." "What did that log disclose?" He is entitled to ask that question.

Mr. Lamey: Right.

Court: Do I understand you are perfectly willing to have your witness answer those questions as to what the logs disclosed?

Mr. Lamey: Yes. The logs of those wells down in the south end are just as available to Mr. Erickson as to us. [526]

Court: And the other data, too. I am not referring just to the logs, but any other data that he examined and upon which his opinion is based, you are willing for him to disclose, and you are willing then for the plaintiffs to have an opportunity to examine them?

Mr. Gullickson: May it please the Court, I would like to clear up one point. On the actual seismic data, as I understand it, they take what are called seismograms, about the size of a shoe. Those are stacked up in an area such as this in huge piles. It takes technical people many months, as I understand, to attempt to evaluate what these actual data shows. Now, actually, when we get to what we are talking about in the nature of a seismic map, a

seismic map represents nothing more or less than the particular geologist's interpretation who is working on that particular project. In other words, the basic data which we would have to bring in Court on seismograph operations would be the seismograms themselves, and let the plaintiffs' experts work for months attempting to evaluate the result of that seismic shooting. That is the practical result of the ruling.

Court: This witness didn't go through all these?

Mr. Gullickson: No.

Court: All he did was look at the over all map.

Mr. Lamey: We haven't examined the witness in detail.

Court: You don't have to make anything available as a [527] result of the witness' testimony over and above what he himself examined and based his opinion on.

Mr. Lamey: He went and made examinations or had people work that down for him to certain points. He may not have examined everyone of those himself. He was on the study from 1949 on.

Court: He didn't examine them.

Mr. Lamey: Not all of them.

Court: If he examined just a map and draws his conclusion from the map, all you have to do is bring in the map. If he examined some logs, make them available. If he didn't examine them, why then, of course, they are of no consequence in the matter. I thought maybe I misunderstood, but I don't think I did. I think you don't want to disclose some of the information upon which he bases his conclusion,

and when that became obvious, then is when I sustained the objection. Let's argue these points, then, on briefs anyway prior to going into the case as a whole because I think there is no use arguing the case as a whole at this point if then later we have to reopen it to correct some ruling I have made, so each of you, I sustained objection as to evidence you were trying to introduce. If you will write a brief sustaining your position on that within 30 days, and counsel may have 15 days thereafter to file a brief in reply to it. Then, as quickly as possible, I will advise you of my rulings, and if I don't change my [528] opinion, then we will fix the date for the filing of briefs in the case as a whole.

Mr. Erickson: There is one practical matter with us. I think on the point of the admissibility of evidence which we offered as to the discussions concerning the meaning of the contract, I think Mr. Richards has sufficient notes to make our brief without reference to the transcript, but it occurs to me we might run into a situation where we would have to ask the Reporter to get us a transcript, at least of that portion of the testimony, and in the event we should encounter some delay there, we would have to request an extension.

Court: Do you think we had better argue it at one time, the whole case?

Mr. Lamey: We would leave it to the Court. If you want us to do it together——

Court: I will advise you specifically of my rulings on these two major points that have arisen during the course of the trial.

Mr. Lamey: Then, would you like us to proceed on the same time you have indicated here?

Court: I would suppose that you want a transcript before you file your briefs.

Mr. Erickson: Yes, and in view of the size of the transcript, and the number of matters to be digested and briefed, I don't believe that 30 days would be adequate for the plaintiffs [529] after receipt of the transcript for the brief. We are anxious to move the matter along, but 45 days would give us more reasonable time.

Court: After receipt of the transcript then, you may have 45 days within which to present briefs on the case as a whole, and on the particular questions of evidence, you may include that in your briefs. What time do you want, 30 days after receipt of the brief of plaintiffs?

Mr. Lamey: 30 days.

Court: 30 days. If you need more time, it will be available.

Mr. Erickson: In view of the fact the answer sets up affirmative defenses, there are various elements of it and various theories. I wonder if we could have 15 days for a reply brief.

Court: Very well.

Mr. Lamey: May it please the Court, at the time we file our briefs, should we submit findings?

Court: Yes, submit proposed findings and conclusions at the time you submit your briefs.

Mr. Lamey: I ask that in view of Rule 62 of the District.

Court: The Rules of this District are so disin-

egrated it doesn't make much difference what the rule is, but I think it would be a good idea to file at the time you file your briefs proposed Findings of Fact and Conclusions of Law. [530]

Mr. Erickson: There is one other practical matter. We have available a machine here to duplicate the exhibits. I understand the Clerk will be here for the next several days. I don't know whether an order of Court is necessary to permit us to bring the machine over to his office to make duplicates.

Court: Yes, you may do that.

Mr. Erickson: May I, without appearing to be presumptuous, express the appreciation of the plaintiffs to the Court for the courtesy with which you have listened to us.

Mr. Lamey: We too thank you for your patience.

Court: I appreciate the assistance of counsel and enjoyed being with you all. I think we will work the thing out, and the two rulings I have made in the course of the trial, I suppose the more important is the ruling I made excluding the evidence you offered. I don't know the ruling I made with reference to your problem is going to be of importance at all in any event, but you can argue it anyway, but I think you are the one that is up against the blaze, so thank you again, gentlemen. [531]

[Endorsed]: Filed May 23, 1955.

[Endorsed]: No. 15293. United States Court of Appeals for the Ninth Circuit. Cedar Creek Oil and Gas Company, a corporation, International Trust Company, a corporation, H. C. Smith, Susan M. Wight and W. B. Haney, Appellants, vs. Fidelity Gas Company, a corporation, Montana-Dakota Utilities Company, a corporation and Shell Oil Company, a corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Montana, Billings, Montana.

Filed: September 13, 1956.

Docketed: September 24, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15293

CEDAR CREEK OIL AND GAS COMPANY,
a corporation; INTERNATIONAL TRUST
COMPANY, a corporation; MONDAKOTA
GAS COMPANY, a corporation; H. C.
SMITH; SUSAN M. WIGHT; and W. B.
HANEY, Appellants,

vs.

FIDELITY GAS COMPANY, a corporation;
MONTANA-DAKOTA UTILITIES COM-
PANY, a corporation; and SHELL OIL
COMPANY, a corporation, Appellees.

STATEMENT OF POINTS

The points upon which appellants intend to rely on this appeal are as follows:

(1) The Court erred in entering judgment for the defendants.

(2) The Court erred in holding the instruments designated as the Fidelity Operating Agreements, Gas Purchase Agreements and Cooperative or Unit Plan of Development, Unit 5, Cedar Creek Anticline valid, subsisting agreements, in full force and effect as between plaintiffs and defendants.

(3) The Court erred in holding that plaintiffs and each of them hold and own their respective interests in the lands and leases involved subject to

and subordinate to the instruments referred to in point number 2.

(4) The Court erred in making its Finding Number XXI that the defendant Shell Oil Company in accomplishing geological and geophysical surveys and in drilling a well completed in January, 1952, relied on the validity of the Fidelity Operating Agreements.

(5) The Court erred in making its Finding Number XXII that the defendants at no time evidenced any intention or took any action to abandon their rights on the Cedar Creek Anticline under the Fidelity Operating Agreements with respect to the interests of the plaintiffs, and in making its Conclusion of Law Number III that none of the rights granted defendant Fidelity Gas Company under the Fidelity Operating Agreements have been abandoned by Fidelity Gas Company.

(6) The Court erred in making its Finding of Fact Number XXIII that the plaintiffs remained silent and made no claim that the Fidelity Operating Agreements had expired or had been terminated until the filing of this action on February 2, 1953.

(7) The Court erred in making its Finding Number XXV that all of the development and other activities carried on by the defendants were performed in reliance on the belief that the Fidelity Operating Agreements covering plaintiffs' interests were valid, subsisting agreements and in full force and effect.

(8) The Court erred in making its Finding Number XXVI that it was not until the value of plain-

tiffs' interests had been greatly enhanced and their oil producing possibilities demonstrated by the development work and expenditures of the defendants that any claim was made by plaintiffs to the defendants that the Fidelity Operating Agreements were no longer in effect.

(9) The Court erred in making its Finding of Fact Number XXVII that if the relief prayed for by the amended complaint is granted, the future development for the production of oil from the Cedar Creek Anticline, as now planned and carried on by defendant Shell Oil Company, will be impaired.

(10) The Court erred in making its Conclusion of Law Number IV that the plaintiffs are guilty of laches and barred from obtaining a judgment and decree cancelling or forfeiting Fidelity Operating Agreements.

(11) The Court erred in making its Conclusion of Law Number V that the plaintiffs are estopped from obtaining a judgment and decree of the Court cancelling or forfeiting the Fidelity Operating Agreements.

(12) The Court erred in making its Conclusion of Law Number VI that plaintiffs have waived any right to obtain a judgment cancelling or forfeiting the Fidelity Operating Agreements.

(13) The Court erred in failing to hold that the Fidelity Operating Gas Agreements expired by their own terms by reason of the failure of Fidelity Gas Company to drill exploratory wells within a reasonable time after the completion of the first three wells.

(14) The Court erred in not finding that Fidelity Gas Company abandoned its right under the agreements involved.

(15) The Court erred in not finding that it was the duty of the defendant Fidelity Gas Company to diligently and within a reasonable time continue exploration for oil in the deeper sands, that the only consideration for the Fidelity Gas Agreement was the exploration and drilling for oil by Fidelity Gas Company, and that failure to diligently and within a reasonable time continue exploration for oil in the deeper sands terminated the said agreements.

(16) The Court erred in excluding oral testimony as to the circumstances under which Paragraph IV of the Fidelity Agreements were negotiated.

(17) The Court erred in not holding that there was no relationship between the drilling of the Carter Oil Well and the Husky Well to the drilling contemplated under the Fidelity Gas Operating Agreements, and not holding that there was no drilling under the Fidelity Gas Operating Agreement after July, 1938.

(18) While the Court correctly held that the Fidelity Gas Operating Agreement was an option, it erred in not finding that the option had not been exercised by Fidelity Gas Company and therefore, the Fidelity Gas Operating Agreement had expired many years prior to the commencement of this litigation.

(19) The Court erred in failing to find that the defendants are estopped from claiming any interest under the agreements here involved.

(20) The Court erred in failing to find that defendants had waived any right to claim any interests under the agreements here involved.

(21) The Court erred in failing to find that defendants were barred by laches from claiming any interests under the agreements here involved.

(22) The Court erred in not finding that defendants Fidelity Gas Company and Montana-Dakota Utilities Company had full knowledge long prior to the making of the agreement by the said two defendants with the Shell Oil Company, that said defendants had no rights or interests under the Fidelity Gas Operating Agreements to any of the lands or interests of the plaintiffs.

(23) The Court erred in failing to find that Shell Oil Company had notice prior to the making of the agreement with the defendants Fidelity Gas Company and Montana-Dakota Utilities Company that said companies had no interests in or claim to the lands or leases of the plaintiffs.

Dated this 26th day of September, 1956.

/s/ LEIF ERICKSON

Attorney For Appellants

[Endorsed]: Filed Sept. 29, 1956. Paul P. O'Brien, Clerk.

